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IN THE

Supreme Court of the United States

October Term, 1992

HYBUD EQUIPMENT CORPORATION,
INDUSTRIAL EXCESS LANDFILL,
INC., AND HYMAN BUDOFF,
Petitioners,

vs.

SPHERE DRAKE INSURANCE COMPANY, LTD.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are the Equal Protection and Due Process Clauses of Amendment XIV of the U. S. Constitution violated when the Supreme Court of Ohio interprets the pollution exclusion of a standard form comprehensive general liability insurance policy inconsistent with other State Supreme Courts and U. S. Court of Appeals opinions dealing with defense and coverage obligations under identical policies for an underlying federal (*i.e.*, Superfund) cause of action and other related civil common-law actions?

2. Are the Due Process and Equal Protection Clauses of Amendment XIV of the U. S. Constitution violated when the Supreme Court of Ohio makes a decision which inexplicably fails to apply and/or follow its own long-standing precedent and rules of construction for insurance policy interpretation?

3. Are the Due Process and Equal Protection Clauses of Amendment XIV of the U. S. Constitution violated when the Supreme Court of Ohio ignores and/or fails to enforce insurance policy language in accord with insurance company explanations accompanying policy language submitted to the state insurance regulators for review and approval?

4. Are the Due Process and Equal Protection Clauses of Amendment XIV of the U. S. Constitution violated when the Supreme Court of Ohio determines from the pleadings alone that defense and coverage for the underlying actions are barred by the pollution exclusion?

5. Are Amendment VII and the Due Process and Equal Protection Clauses of Amendment XIV of the U. S. Constitution violated where Petitioners are denied a jury trial in a case where a proper timely jury demand had been made and not subsequently waived?

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1. *Hybud Equipment Corporation v. Sphere Drake Insurance Company, Ltd.*, 64 Ohio State 3d 657, 597 N.E.2d 1096 (1992).

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   a. Order filed June 30, 1989.

   b. Findings, Decision and Judgment Entry filed February 7, 1990.

   c. Findings of Fact and Conclusions of Law filed May 7, 1990.

   d. Judgment Entry filed April 30, 1990.

All of the foregoing are included in the Appendix, *infra*.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

1. The opinion of the Supreme Court of Ohio in *Hybud v. Sphere Drake* is dated September 16, 1992.

2. The Supreme Court of Ohio denied a rehearing in *Hybud v. Sphere Drake* by Rehearing Entry filed October 28, 1992.

3. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment VII of Constitution of United States.

2. Amendment XIV of Constitution of United States.

3. 42 United States Code §§9605, 9606 and 9607(a).

4. Article I, Section 5, of Constitution of Ohio.

5. Ohio Revised Code §§3901.20, 3901.21 and 3937.03.

All of the foregoing provisions are set forth in the Appendix, *infra.*

STATEMENT OF THE CASE

This case arises out of the failure of respondent Sphere Drake Insurance Company, Ltd. ("Respondent") to defend the petitioners Hybud Equipment Corporation, Industrial Excess Landfill, Inc., and Hyman Budoff ("Petitioners"),[1] pursuant to standard form comprehensive general liability insurance policies, against three pollution-related claims asserted against the Petitioners for damages and other relief under various theories of recovery. Because of the Respondent's failure to defend Petitioners in the underlying actions, Petitioners suffered significant compensatory damages including, but not limited to, the direct out-of-pocket costs of defending the underlying cases and prosecuting the instant case.

In the courts below, Respondent denied any obligations to Petitioners under the standard form comprehensive general liability insurance policies for a variety of reasons, including asserting that a pollution exclusion applied.

After bench trials in the Court of Common Pleas for Summit County, Ohio ("the Trial Court"), in July 1989 and April 1990, a judgment was entered in favor of Petitioners on all declaratory judgment issues, declaring that Respondent had a duty to defend Petitioners in the three underlying cases and awarding a money judgment against Respondent in the amount of $181,287, plus additional defense costs and prosecution costs to be incurred after March 31, 1990, in the ongoing litigation

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[1] In accordance with Rule 29.1 of the Revised Rules of the Supreme Court of the United States, Petitioners state that Hybud Equipment Corporation is a wholly-owned subsidiary of Hybud Waste Industries, Inc. Industrial Excess Landfill, Inc. has no parent company or subsidiaries.

(Appendix, pp. A43-A44). In accordance with all prior Ohio state court precedent as well as a wealth of legal authority from other courts, the Trial Court specifically found that the pollution exclusion contained in the standard form comprehensive general liability insurance policies issued by Respondent to Petitioners did not exclude defense and coverage obligations for the three underlying cases.

Respondent filed an appeal with the Court of Appeals for the Ninth Judicial District of Ohio ("the Court of Appeals"). Petitioners' cross-appealed on tort liability and damages issues, including the denial of a jury trial in the Trial Court. On January 30, 1991, the Court of Appeals issued its Decision and Journal Entry which affirmed the Trial Court's determinations in all respects (Appendix, pp. A23-A36).

The case was then appealed by both Petitioners and Respondent to the Supreme Court of Ohio. On September 16, 1992, the Supreme Court of Ohio issued its decision reversing the lower courts and entering judgment on behalf of Respondent on the grounds that the pollution exclusion contained in the standard form comprehensive general liability insurance policies barred any defense and coverage obligations owed by Respondent to Petitioners (Appendix, pp. A1-A22).

After denial of their motion for rehearing filed in the Supreme Court of Ohio (Appendix, p. A49), Petitioners hereby petition the Supreme Court of the United States for a writ of certiorari to review the merits of the various substantial constitutional and other important and highly controversial questions of law raised by this case.

STATEMENT OF FACTS

Petitioner Hybud Equipment Corporation ("Hybud") is an Ohio corporation with its principal place of business at 556 Beacon Street, Akron, Ohio. Hybud has been in the solid waste business for approximately 35 years, building and leasing solid waste equipment, compactors and containers, as well as hauling solid waste for various commercial, industrial and institutional organizations within a 50-mile radius of Akron, Ohio. Hybud employs 30 to 35 local residents. Hybud is a union shop, having entered into successive collective bargaining agreements with its hourly work force with the Teamsters Union since approximately 1973.

Over the years, Hybud has transported solid waste to a variety of licensed landfills, including one formerly operated at 12646 Cleveland Avenue, N.W., Uniontown, Ohio, and known as the Industrial Excess Landfill, as well as one located in Montville Township, Medina County, Ohio, and known as the Montville Landfill. Hybud has never owned or operated either site. Hybud has never hauled any hazardous waste. Hybud is independently owned and operated; it is not affiliated in any way with a large publicly-owned waste handling company.

Petitioner Industrial Excess Landfill, Inc. ("IEL") is an Ohio corporation which owns the Industrial Excess Landfill site in Uniontown, Ohio, upon which a duly authorized and licensed landfill was formerly operated from 1968 to 1978. While IEL continues to own the site, IEL does not engage in any business since the Ohio EPA approved closure of the site which was completed in 1980. IEL is not affiliated in any way with the large publicly-owned landfill companies.

Petitioner Hyman Budoff is a life-long Summit County resident and U. S. citizen, who resides at 374 North Pershing Avenue, Akron, Ohio. Hyman Budoff is an officer and director of both Hybud and IEL. Hyman Budoff owns 100% of the outstanding stock in IEL; he also owns preferred stock in Hybud.

From the beginning of business operations, Petitioners have always purchased and maintained comprehensive general liability insurance policies, naming each of them as insureds. Petitioners have always understood that the comprehensive general liability insurance policies covered a broad range of risks, including the kinds of risks and claims such as the ones that underlie the present case. In addition to the coverage aspects of the policies, Petitioners always expected and entrusted their general liability insurance companies over the years with the obligation to defend any liability claims that may be asserted against the Petitioners by anyone that did or may pertain to each insurance company's period of coverage. Over the years, Petitioners have been named insureds under general liability insurance policies issued by different insurance companies depending upon cost and availability of necessary coverages.

Respondent Sphere Drake Insurance Company, Ltd. is a huge international insurance company based in London, England, and is related to Lloyd's of London. Respondent was represented in the issuance of the comprehensive general liability insurance policies in issue in this case by Ostrov Corporation, who acted as a general underwriting agent for Respondent in Ohio.

The first comprehensive general liability insurance policy issued to Petitioners by Respondent, Certificate No. OS-1028SMP, insured the Petitioners for the period

July 30, 1985 through July 30, 1986, with bodily injury and property damage limits of $500,000. The second policy issued by Respondent, Certificate No. OS-1070SMP, insured Petitioners for the period June 30, 1986 through June 30, 1987, with bodily injury and property damage limits of $300,000. With respect to the issues raised by this case, each policy used the same standard forms used by other insurance companies in Ohio and throughout the United States.

The first pertinent part of the first insurance policy reads as follows:

> The Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of
>
> COVERAGE A. bodily injury or
>
> COVERAGE B. property damage
>
> to which this insurance applies, caused by an occurrence, and the Company shall have the right and *duty to defend* any suit against the insured seeding (sic) damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation in settlement of any claim or suit as it deems expedient . . .. (Emphasis added.)

The second policy had virtually identical language establishing the duty to defend and providing coverage for liability claims.

Each policy also contained an identical exclusion which is now the central controversy of this case:

> This part does not insure:

* * * * *

> (f) bodily injury or property damaga (sic) arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquied (sic) or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; *but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental*; . . . (Emphasis added.)

This exclusion will be referred to throughout this petition as "the pollution exclusion".

After both policies were paid for and issued, the three different liability claims in issue in this case were asserted against Petitioners. These claims will be discussed in chronological order.

On November 18, 1987, Linda Putinski filed a civil complaint in the United States District Court for the Northern District of Ohio, Eastern Division, Case No. C87-3011A, against Petitioners and others. In essence, Linda Putinski's complaint claimed Petitioners were liable to her for compensatory damages arising out of bodily injury and property damage under various theories of liability, including negligence, strict liability, nuisance, and negligent infliction of mental and emotional distress, all attributable to alleged release(s) of hazardous substances from the IEL site. Mrs. Putinski also asserted a federal cause of action under 42 U.S.C. §9607 "for the recovery of monies already expended and to be expended for investigative activities, clean-up, and other response activities" related to the IEL site.

On December 9, 1987, the United States Environmental Protection Agency (USEPA) issued an administrative order, purportedly pursuant to 42 U.S.C. §9606, requiring Petitioners Hybud and IEL and other named respondents to "undertake [certain] remedial design and remedial action" connected with the IEL site in Uniontown, Ohio, in order "to abate an alleged imminent and substantial endangerment arising from the release or threatened release of hazardous substances present at the site." The order further provided that the IEL site had been placed on the National Priorities List, purportedly pursuant to 42 U.S.C. §9605, which made the site a Superfund site. A second administrative order issued January 28, 1988, superseded the previous order but did not make any changes which are germane to this case.

Petitioners notified Respondent of the Putinski lawsuit and the two USEPA administrative orders, and demanded that Respondent provide defense and coverage for the orders and claims of the USEPA and Mrs. Putinski as required by the policies of insurance issued to Petitioners by Respondent. By letter dated March 28, 1988, Respondent said it refused to provide a legal defense or coverage for either the Linda Putinski lawsuit or the USEPA orders and claims for the sole reason that in applying for insurance coverage, Petitioners had "withheld, concealed and/or misrepresented to the agents of Sphere Drake Insurance Company, Ltd. facts which would have been materially significant to its decision as to whether to insure or not to insure [Petitioners]."[2] No assertion was made (or reserved) by Respondent that the pollution exclusion barred defense or coverage for these claims.

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[2] At trial, Respondent's own agents admitted that there was no fraud, concealment, misrepresentation or withholding of information as had been claimed by Respondent. Moreover, Respondent's own trial attorney admitted during the trial that Respondent had no evidence whatsoever to support the sole grounds given in the denial letter. Therefore, the Trial Court completely rejected that grounds of denial. Respondent did not appeal the issue and it is no longer an issue in this case.

On May 31, 1988, Petitioner Hybud was named as a third-party defendant in an amended third-party complaint filed in the Common Pleas Court for Medina County, Ohio, Case No. 42595, arising out of activities at a landfill located in Montville Township, Medina County, Ohio known as the Montville landfill. The amended third-party complaint alleged that Petitioner Hybud was liable to the third-party plaintiffs for compensatory damages under contribution and primary and secondary theories of liability. Hybud notified Respondent of the amended third-party complaint filed against it, and demanded that Respondent provide a defense and coverage as required under the policies of insurance. By letter dated June 20, 1988, Respondent said it refused to provide a defense to the Montville Landfill lawsuit for the same reason that it had denied its obligations for the USEPA and Putinski matters.

In March of 1989, Petitioner IEL received a general notice of potential liability from the USEPA of its potential liability for the cost of all response activities to date and to be undertaken in the future at the Industrial Excess Landfill site in Uniontown, Ohio. By letters dated May 26, 1989, Petitioners IEL and Hybud each received a special notice of liability from the USEPA for the IEL site.

On October 13, 1989, Petitioners and others were named as defendants in a case filed by the United States of America in the United States District Court for the Northern District of Ohio, Eastern Division, Case No. 89CV-1988.[3] In this complaint, the United States claimed that the Petitioners and others were liable to plaintiff for any and all response costs incurred or to be incurred in connection with the study and remediation of the IEL site, pursuant to 42 U.S.C. §9607. By letter dated October 19, 1989, Petitioners notified Respondent of the case filed by the United States and demanded that Respondent provide a defense and coverage as required under the policies of insurance issued to Petitioners. By letter dated October 24, 1989, Respondent again refused to defend Petitioners.

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[3] On February 14 and 23, 1990, the United States filed amended complaints against Petitioners and others. The amendments do not affect the analysis of the issues in this case.

Petitioners have denied any and all liability for the underlying claims. Petitioners' position has so far been vindicated. Both the Putinski and Montville Landfill lawsuits have been concluded: one by dismissal and one by settlement with payment of a nuisance sum of money. Thus, the only underlying case to this case which remains ongoing is the United States' Superfund cost recovery action related to the IEL site.

Because of Respondent's position, Petitioners had to undertake their own defense. While some other insurance companies have made partial reimbursements of the defense costs, the unreimbursed portion of defense costs plus the costs of litigating with the insurance companies over those issues have created serious financial distress to Petitioners. Without relief in this case, Petitioners' financial resources will inevitably fail with all employees losing their jobs and the United States being stuck with orphan shares of Superfund liability for any liability that may be proven against Petitioners in the underlying Superfund cost recovery action.

ARGUMENT FOR GRANTING THE WRIT

I. The Equal Protection And Due Process Clauses Of Amendment XIV Of The U. S. Constitution Are Violated When The Supreme Court Of Ohio Interprets The Pollution Exclusion Of The Standard Form Comprehensive General Liability Insurance Policy Inconsistent With Other State Supreme Courts And U. S. Court Of Appeals Opinions Dealing With Defense And Coverage Obligations Under Identical Policies For An Underlying Federal (*i.e.*, Superfund) Cause Of Action And Other Related Civil Common-Law Actions.

The Court should grant certiorari to hear the merits of this issue. The issue of whether there are defense and coverage obligations for Superfund and related civil claims owed by an insurance company to policyholders under a standard form comprehensive general liability insurance policy containing a pollution exclusion is one of the most hotly contested and deeply divided issues existing in present jurisprudence. Because the outcome of this issue will directly impact the enforcement and effectiveness of the Superfund laws, it is imperative that this Court address the issue and resolve the disparate treatment which presently exists on this issue in the various state and federal courts. As will be shown in greater detail below, policyholders in some jurisdictions are entitled to defense and coverage for Superfund claims whereas those located in other jurisdictions such as the Petitioners in this case are accorded no defense or coverage protection for the identical underlying causes of action. This kind of disparate treatment with respect to federal claims is exactly the kind of treatment which violates the equal protection and due process clauses of Amendment XIV of the U. S. Constitution. Accordingly, this Court should elect to grant certiorari in this case and consider whether insurance companies who issued the standard form comprehensive general liability insurance policies around the country ought to be required to provide defense and coverage for underlying claims such as Superfund claims which are pending throughout the United States. Otherwise, insureds in such states as Illinois, Wisconsin, West Virginia, Florida and Georgia will be accorded defense and coverage while those in states such as Ohio or Michigan will have no such protections under the identical insurance policies for the identical kind of federal claims. This kind of result is not only unjust but unconstitutional. The Court should take this case and eliminate this unfair disparate treatment.

The majority of state supreme courts that have interpreted the pollution exclusion contained in standard form comprehensive general liability insurance policies have determined said exclusion to be ambiguous and have construed it in favor of defense and coverage obligations for the policyholders. See Stephen Jones, "Debate Rages Over Insurance Coverage", The National Law Journal, p. 20 (Feb. 24, 1992) ("The apparent *majority* rule is that the term [sudden] is ambiguous and . . . must be interpreted against the insurance company." p. 22 (Emphasis added.))

Moreover, there have been six recent state supreme court cases decided in favor of the policyholders on this very issue within the last three years. In each case, the respective state supreme courts held that the word "sudden" can also mean unexpected and unintended and, thus, was ambiguous and had to be construed against the insurance company. As a result coverage and defense obligations were enforced against the insurance companies involved in each case. See *Outboard Marine Corp. v. Liberty Mutual Ins. Co.,* 1992 W.L. 356056 (decided Dec. 4, 1992 by Supreme Court of Illinois); *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corporation*, 1992 W.L. 212008 (decided Sept. 3, 1992 by Supreme Court of Florida); *Joy Technologies, Inc. v. Liberty Mutual Ins. Co.*, 1992 W.L. 172870 (decided June 11, 1992 by Supreme Court of Appeals of West Virginia); *Hecla Mining Company v. New Hampshire Insurance Co.*, 811 P.2d 1083 (Supreme Court of Colorado 1991); *Just v. Land Reclamation Ltd.*, 155 Wis. 2d 737, 456 N.W.2d 570 (Supreme Court of Wisconsin 1990), modified on denial of reconsideration 157 Wis. 2d 507, 461 N.W.2d 447; and *Claussen v. Aetna Casualty & Surety Co.*, 259 Ga. 333, 380 S.E.2d 686 (Supreme Court of Georgia 1989). In addition to these cases, there are dozens of other cases decided by other courts in favor of policyholders on this very issue throughout the country. See list of cases in the Appendix, *infra* pp. A79-A84. As has been noted by the Third Circuit U. S. Court of Appeals in *New Castle County v. Hartford Accident & Indemnity Co.*, 933 F.2d 1162 (3d Cir. 1991), there are still deep divisions of court opinions being issued on this very issue.

In light of the developing majority rule and the deep division of decisions on the proper interpretation to be given to the pollution exclusion contained in standard form comprehensive general liability insurance policies and its critical impact upon the practical enforcement and collectibility of claims made under the Superfund Act, it is imperative for this Court to accept this case and decide the issue.

At present, the situation exists that Superfund claims concerning alleged hazardous waste sites in some states where policyholders may be entitled to defense and coverage while in other states no similar benefits are afforded even though the nature of the claims is completely identical. In some instances, some policyholders at a site may have defense and coverage and others may not with respect to the same policies and claims. This creates the anomalous result that policies issued to policyholders will provide coverage and defense in some states but not in others for the identical claims. This is a classic violation of equal protection and due process.

Moreover, the decision of the Supreme Court of Ohio, if undisturbed, will have a catastrophic impact upon the practical enforcement of the Superfund Law in the State of Ohio. Small policyholders of meager resources such as the plaintiffs here cannot afford to defend themselves from the Superfund claims nor can they afford to pay any claims. This will mean that the U. S. Government, the State of Ohio (because of its 10% match requirement) and taxpayers will have to foot the bill for Superfund cleanups in Ohio (but not in states having interpretations in favor of the policyholders). This also leads to the anomalous result that responsible companies who made provisions for comprehensive general liability insurance coverage are stripped of that benefit when claims are made. It is particularly disingenuous that a landfill owner such as IEL is to be accorded no benefits under its comprehensive general liability insurance policies for any unintended or unexpected pollution that may be occurring at its site. One must ask what the Petitioners have been paying for all these years when they were paying their substantial premiums on these standard form comprehensive general liability insurance policies.

Clearly, this case raises important issues which will have a dramatic impact upon the practical enforcement of federal statutes in Ohio and elsewhere as well as raises the important constitutional issues that must be resolved. The number of amicus participants in the Supreme Court of Ohio on this issue as well as the plethora of conflicting judicial interpretations of the pollution exclusion being decided all over the United States makes it critical that this Court grant certiorari in this case and resolve these important issues to apply uniformity of treatment of insurance coverage for Superfund claims.

II. The Due Process And Equal Protection Clauses Of Amendment XIV Of The U. S. Constitution Are Violated When The Supreme Court Of Ohio Makes A Decision Which Inexplicably Fails To Apply And/Or Follow Its Own Long-Standing Precedent And Rules Of Construction For Insurance Policy Interpretation.

There is a long-standing rule of law in the State of Ohio that the existence of conflicting decisions concerning the meaning of a term in an insurance policy demonstrates the fundamental ambiguity of that term. The syllabus in *George H. Olmsted & Co. v. Metropolitan Life Insurance Co.*, 118 Ohio St. 421, 161 N.E. 276 (1928), reads:

> 1. Where the language of a clause used in an insurance contract is such that courts of numerous jurisdictions have found it necessary to construe it and in such construction have arrived at conflicting conclusions as to the correct meaning, intent and effect thereof, the question whether such clause is ambiguous ceases to be an open one.

The plethora of litigation over the interpretation of the pollution exclusion demonstrates under the *Olmsted* rule the doubtfulness, uncertainty and ambiguity of the exclusion. In such circumstance, then the rules which apply to ambiguous terms must be followed.

In Ohio, an insurance policy is to be strictly construed against the insurer and in favor of the insured where the language used is doubtful, uncertain or ambiguous. *Munchik v. Fidelity & Casualty Company of New York,* 2 Ohio St. 2d 303, 209 N.E.2d 167 (1965); *Toms v. Hartford Fire Insurance Co.,* 146 Ohio St. 39, 63 N.E.2d 909 (1945). In particular, policy provisions which exclude coverage are to be strictly construed against the insurer where the language is ambiguous. *Munchik v. Fidelity & Casualty Company of New York, supra.*

Finally, that which is not excluded from the operation of an insurance contract is included in the operation thereof. *Home Indemnity Company v. Village of Plymouth,* 146 Ohio St. 96 (1945). Where, as here, an exclusion is reasonably susceptible of more than one meaning, it should have been construed in favor of the insured and strictly against the insurer. *Hutchinson v. J C Penney Casualty Insurance Co.,* 17 Ohio St. 3d 195, 197, 478 N.E.2d 1000, 1003 (1985).

In Ohio, a Court may not rewrite an insurance policy to define coverage, nor may it rewrite a policy to deny coverage and to protect the insurer from its own drafting. *Cincinnati Insurance Company v. Phillips,* 52 Ohio St. 3d 162, 166, 556 N.E.2d 1150, 1154 (1990). It is clear from an examination of the opinion issued by the Supreme Court of Ohio that it improperly goes beyond the evidence of record and rewrites the policies at issue to deny coverage for the insureds. The opinion holds that if the term "sudden" does not have a temporal element, then the pollution exclusion would be surplusage in light of the "typical" definition of "occurrence." 64 Ohio St. 3d at 666. The opinion acknowledges that the policies at issue do not define occurrence. *Id.* at 661 Note 1. Nonetheless, the opinion, by repeatedly relying on the "typical" definitions of "occurrence," a definition not of record, rewrites the policies at issue in order to construe the pollution exclusion in violation of the above rule.

The Supreme Court of Ohio also failed to follow its well-established practice of referring to dictionaries in determining the meaning of a term in an insurance policy. See *Olmstead v. Lumbermans Mutual Ins. Co.,* 22 Ohio St. 2d 212, 218, 259 N.E.2d 123, 127 (1970); *Home Indemnity Company v. Plymouth, supra;* and *Munchik v.*

Fidelity & Casualty Co., supra. That Court's opinion inexplicably departs from this practice when it concludes:

> As it is most commonly used, 'sudden' means happening quickly, abruptly, or without prior notice. This is the plain and ordinary meaning of the word. . . . *Supra* at page 666.

That Court provides no support for this factual conclusion about word usage.

Had the Supreme Court of Ohio surveyed commonly used dictionaries, as it is obligated to do under past precedent, such a conclusion could not have been reached because there are various and numerous dictionary definitions of the word "sudden" that are consistent with Petitioners' position in this case. Webster's Third New International Dictionary (1986), consulted by the Supreme Court of Ohio in *Munchik,* gives as the first meaning of "sudden": "happening without previous notice or with very brief notice: coming or occurring unexpectedly: not foreseen or prepared for" (p. 2284). The definition in Black's Law Dictionary (6th Ed. 1990) excludes any temporal component. It defines "sudden" to mean: "happening without previous notice or with very brief notice; coming or occurring unexpectedly; unforeseen; unprepared for" (p. 1432). The Oxford English Dictionary defines "sudden" as "happening or coming without warning or premonition; taking place or appearing all at once. In some contexts the implication is rather 'unexpected, unforeseen, unlooked for'; or 'not prepared or provided for.' " *Id.* at 115 (2d Ed. 1989).

It is fundamentally unjust and unconstitutional for the Supreme Court of Ohio to fail to apply and/or follow the foregoing long-standing principles of law when making its decision in this case.

III. The Due Process And Equal Protection Clauses Of Amendment XIV Of The U. S. Constitution Are Violated When The Supreme Court Of Ohio Ignores And/Or Fails To Enforce Policy Language In Accord With Insurance Company Explanations Accompanying Policy Language Submitted To The State Insurance Regulators For Review And Approval.

Ohio law imposes significant regulations on insurance companies that sell insurance to Ohio policyholders. Every insurer doing business in the State of Ohio is required to file with the Superintendent of Insurance every form of a policy, endorsement, rider, etc., which it proposes to use. Ohio Revised Code §3937.03(A). Such filings may be made on behalf of insurers by licensed rating organizations. O.R.C. §3937.03(B). No insurer is permitted to make or issue a contract or policy except in accordance with the filings which are in effect. O.R.C. §3937.03(H). Moreover, O.R.C. §3901.20 prohibits any person (including insurance companies) from engaging in any unfair or deceptive acts, which includes the making or issuing of any statement misrepresenting the terms of any policy (O.R.C. §3901.21(A)).

The general use of the pollution exclusion in issue in this case commenced in June 1970 as a result of filings made by the Insurance Rating Board with the Director of Insurance for the Ohio Insurance Department. In the "Explanation" of the meaning of the pollution exclusion, the Insurance Rating Board told the Ohio Insurance Department that "coverage is *continued* for pollution or contamination-caused injuries when the pollution or contamination results from an accident." (Emphasis added.) The "Explanation" also stated that the exclusion "clarifies" the situation of coverage for pollution or contamination to avoid any question of intent. There is no indication in the filing that the insurance industry intended to eliminate or reduce coverage when the alleged property damage took place gradually, as opposed to abruptly.

The meaning of the pollution exclusion advocated by the insurance companies in this case, and accepted by the Supreme Court of Ohio, is at complete odds with the original filings associated with the pollution exclusion. The Ohio Revised Code forbids any insurance company (including Sphere Drake) from making or issuing a policy except in accordance with the filings that are made with the Department of Insurance. The Supreme Court of Ohio's acceptance of the insurance companies' self-serving revision of the pollution exclusion explanation will effectively eliminate this restriction and permit a patent violation of law. It will essentially make insurance companies in Ohio unaccountable for the explanations they provide to the State when they introduce new policy provisions. It can hardly be argued that this is consistent with the purposes of insurance regulation in the State of Ohio. More importantly to this Court, such blatant side-stepping of applicable law constitutes a denial of equal protection and due process. It is not fair to Ohio policyholders that their insurers can blithely deny coverage that they have already said exists. These policyholders have paid for such coverage, and they should be allowed to have the benefits related thereto.

It is essential that this Court acknowledge that the U. S. Constitution requires that statutes be fully and fairly enforced, including that the insurance industry be bound by its legally required affirmative representations to regulatory bodies. As the highest court of West Virginia held just a few months ago:

> The public policy of the State of West Virginia is that the law of the State should be administered in such a way as to insure that corporations which seek to do business in West Virginia act in a manner consistent with their studied, unambiguous, official, affirmative representations to the State, its subdivisions, or its regulatory bodies. *Joy Technologies, supra* at page 1, syllabus ¶2 and 10.[4]

See also *Dimmitt Chevrolet, supra* at 6; *Claussen, supra* at 688. This Court is required to see that the same protection is afforded to Ohio policyholders as are provided to policyholders in other states for identical policies and federal claims and that the laws governing insurance are fully and fairly enforced.

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[4] The insurance industry representations made to the West Virginia Insurance Commissioner are materially identical to those made to the Ohio Insurance Department.

IV. The Due Process And Equal Protection Clauses Of Amendment XIV Of The U. S. Constitution Are Violated When The Supreme Court Of Ohio Determines From The Pleadings Alone That Defense And Coverage For The Underlying Actions Are Barred By The Pollution Exclusion.

The well-established test under Ohio law for determining whether an insurer has a duty to defend a case is whether the potential for liability within the coverage of the insurance policy appears from the allegations in the underlying complaint. *State Farm Fire & Casualty Co. v. Pildner,* 40 Ohio St. 2d 101, 321 N.E.2d 600 (1974); *Socony Vacuum Oil Company v. Continental Casualty Co.,* 144 Ohio St. 382, 59 N.E.2d 199 (1945). It is well-established that where the allegations in an action against the insured state a claim which is "potentially or arguably within the policy coverage or there is some doubt as to whether a theory of recovery within the policy coverage has been pleaded, the insurer must accept the defense of the claim." *City of Willoughby Hills v. Cincinnati Insurance Co.,* 9 Ohio St. 3d 177, 459 N.E.2d 555 (1984). The inquiry is not restricted to the specific allegations of the complaint but may require inquiry as to whether the underlying allegations arguably or potentially fall within the scope of coverage. *City of Willoughby Hills v. Cincinnati Insurance Co., supra* at 180.

After determining that the sudden and accidental exception to the pollution exclusion means that the incident must have happened quickly, abruptly, or without prior notice, the Supreme Court of Ohio then applies this holding to the pleadings of the underlying cases in Part IV of its opinion. There the Supreme Court of Ohio noted that their review of the complaint shows that there was no allegation that the release or discharge of the waste happened abruptly or instantaneously. Accordingly, the Supreme Court of Ohio determined that the exception to the exclusion was not invoked by the complaints.

In making this determination, the Supreme Court of Ohio made two substantial errors. The first is that it ignored all prior precedent decided by that Court which said that where there is ambiguity in the underlying complaint such that it does not state facts sufficiently clear to bring the case within or without coverage, then there is an obligation to defend. The second major mistake in this part of the Supreme Court of Ohio's analysis is that Court's failure to remand the case to the Trial Court so that further discovery, motion practice and trial proceedings may occur so as to flush out the allegations and evidence related to the underlying complaints. See, for example, *Grant Southern Iron and Metal Company v. CNA Insurance Co.*, 905 F.2d 954 (6th Cir., 1990) (even under Michigan's definition of "sudden", there remain genuine issues of fact as to whether the insured's polluting was the result of a few discrete polluting events, each of which was short in duration and accidental in nature.) When this case moved through the Trial Court and the Appeals Court, that exercise was not necessary because of the prior favorable precedent that then existed. See *Buckeye Union Insurance Company v. Liberty Solvents and Chemicals Co.*, 17 Ohio App. 3d 127, 477 N.E.2d 1227 (Summit Cty., 1984); and *Kipin Industries v. American Universal Life Insurance Co.*, 41 Ohio App. 3d 228 (Hamilton Cty., 1987), motion to certify overruled 1-13-88 in Case No. 87-1720 (Supreme Court of Ohio). The Supreme Court of Ohio has followed this practice in the past such as in the

City of Willoughby Hills v. Cincinnati Insurance Co. case. It is fundamentally unfair and unconstitutional to preclude the insureds from attempting to make a showing that some part or all of the underlying cases may fit within the definition of "sudden" as it has been newly defined for courts in the State of Ohio.

V. Amendment VII And The Due Process And Equal Protection Clauses Of Amendment XIV Of The U. S. Constitution Were Violated Because Petitioners Were Denied A Jury Trial In A Case Where A Proper Timely Jury Demand Had Been Made And Not Subsequently Waived.

Petitioners made a timely demand for a jury trial in this case as to all issues in all of their complaints filed with the Trial Court. Despite the timely jury demands, the Trial Court refused to allow a jury to hear the issues and instead those issues were tried solely to the judge. This was a clear violation of the Constitution of the United States (Amendments V and XIV), the Constitution of Ohio (Article I, Section 5) and the Ohio Rules of Civil Procedure, Rules 38 and 39, all of such authorities guaranteeing the right to trial by jury.

The case law clearly favors Petitioners' position on this matter. See *Fuller v. German Motor Sales, Inc.*, 51 Ohio App. 3d 101 (Hamilton Cty., 1988), which states in headnote 2:

> A party who makes a timely demand for a jury trial in a declaratory judgment action is ordinarily entitled to have a jury resolve any material factual questions.

See also, *Harleysville Mutual Insurance Co. v. Santora*, 3 Ohio App. 3d 257 (Cuyahoga Cty., 1982); Ohio Revised Code §2721.10.

The Trial Court, Court of Appeals and Supreme Court of Ohio failed to follow the Ohio Supreme Court precedent established in *Erie Insurance Group v. Fisher*, 15 Ohio St. 3d 380, 474 N.E.2d 320 (1984). In *Erie Insurance Group v. Fisher*, the Supreme Court of Ohio clearly held that a right to trial by jury does exist in a declaratory judgment action between an insurer and its insured which seeks the recovery of money. The Court in *Erie, supra* at 382, said:

> The right to trial by jury does exist in a declaratory judgment action which is between an insurer and the insured or the injured party, and which is for the recovery of money. See, *Ohio Farmers Indemnity Company v. Chames* (1959), 170 Ohio St. 209; *Travelers Indemnity Company v. Cochrane,* [155 Ohio St. 301 (1951)]; *Schaefer v. First National Bank* (1938), 134 Ohio St. 511; *Harleysville Mutual Insurance Company v. Santora* (1982), 3 Ohio App.3d 257; R. C. 2721.10 and 2311.04. The courts of other states which have also enacted the Uniform Declaratory Judgment Act have consistently held that a right to jury trial exists in such an action. See, Annotation 1950 13 ALR 2d 777.

In the case presently before the Court, it is quite clear that a money judgment was being sought and indeed was granted and that, therefore, the case was one which required a jury trial if one was demanded by a party. By failing to permit one in this case, the Constitution, statutes and procedural rules were clearly violated.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the petition for a writ of certiorari be granted and this case be accepted for a review of the merits of all of the foregoing issues.

Respectfully submitted,

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APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided September 16, 1992)

No. 91-641

THE SUPREME COURT OF OHIO

HYBUD EQUIPMENT CORP., *et al.*,
Appellants and Cross-Appellees,

v.

SPHERE DRAKE INSURANCE COMPANY, LTD.,
Appellee and Cross-Appellant.

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[657] [Cite as *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.* (1992), 64 Ohio St.3d 657.]

Insurance—Exclusion in liability insurance policy for damage caused by pollution except pollution by a "sudden and accidental" discharge—"Sudden" is not synonymous with "unexpected" in the typical definition of "occurrence."

APPEAL and CROSS-APPEAL from the Court of Appeals for Summit County, No. 14597.

Industrial Excess Landfill, Inc. ("IEL") is a corporation that, before 1978, owned and operated the Industrial Excess Landfill, a licensed landfill in Uniontown, Ohio. IEL still owns the site of the landfill; however, the landfill no longer accepts any waste.

Hybud Equipment Corporation ("Hybud") is a corporation with its principal place of business in Akron, Ohio. In addition to building and leasing equipment, compactors, and containers for solid waste, Hybud owns a number of vehicles. These vehicles are employed to collect and transport the waste material of various local commercial and industrial entities. Hybud has taken waste to the Industrial Excess Landfill and the Montville Landfill. The latter landfill is located in Medina County, Ohio.

Hyman Budoff is an officer and director of both IEL and Hybud. Over the years, IEL and Hybud have purchased insurance coverage from a number of companies. From July 30, 1985 until June 30, 1987, IEL, Hybud and Budoff were each covered under two policies issued by the Sphere Drake Insurance Company, Ltd. Sphere Drake is authorized to transact business in Ohio through the Ostrov Corporation, an independent insurance agency.

Under the comprehensive general liability insurance provisions of both policies, Sphere Drake agreed to pay on behalf of IEL, Hybud and Budoff any sums which they would become legally obligated to pay as a result of bodily injury or property damage caused by an "occurrence." These provisions also stated that Sphere Drake "shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent***."

[658] Each policy then listed a number of exclusions to the foregoing coverage, including the so-called "Standard Pollution Exclusion." In the second policy,

which covered the period from June 30, 1986 until June 30, 1987, this exclusion was set forth as exclusion (f):

> "This insurance does not apply:
>
> "***
>
> "(f) to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or other water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is *sudden and accidental*[.]" (Emphasis added.)

The relevant exclusion in the first policy, which covered the period from July 30, 1985 until July 30, 1986, was worded in virtually the same manner.

After the second policy expired, three environmental lawsuits were brought, each involving one or more of the three insureds. In two of these actions, IEL, Hybud and Budoff were named as defendants. In the third, Hybud was named as a third-party defendant in an action involving the Montville Landfill.

The first action that involved each of the three insureds was initiated in November 1987 in an Ohio federal district court. In that complaint, the plaintiff, Linda Putinski, alleged that she had suffered bodily injury and property damage as a result of the leakage of certain pollutants from the Industrial Excess Landfill. Specifically, she alleged that as a result of damage to storage containers, various chemicals had escaped into the air, soil, and groundwater over a fourteen-year period.

The second action against each of the three insureds also involved the Industrial Excess Landfill. This action was brought by the United States in October 1989 in the same Ohio federal district court. The complaint was predicated on an administrative order issued by the Environmental Protection Agency in December 1987, and then superseded in January 1988.

In the order, the agency found that the landfill had accepted various waste materials over a twelve-year period, even though IEL had failed to install an impermeable liner to halt any leakage of waste. Consequently, certain contaminants had migrated into residential water wells near the landfill. Based upon this, the complaint alleged that IEL, Hybud and Budoff, along with other named defendants, were jointly and severally liable for any costs incurred by the United States in remedial actions.

The third action was originally filed by the state of Ohio in the Medina County Court of Common Pleas. There, the state sought the cleanup of the [659] Montville Landfill. The complaint alleged that as a result of the manner in which the waste had been handled, a leachate had been generated and was seeping into the local ground and surface waters along with other hazardous waste. The complaint further alleged that this had been occurring since the late 1970s.

In April 1989, Hybud was brought into that action as a third-party defendant. The third-party complaint alleged that even though Hybud knew or should have known that the Montville Landfill was not licensed to accept such waste, Hybud had transported hazardous waste to the landfill over a period of years.

After receiving service in each of the aforementioned actions, the three insureds notified Sphere Drake of each action, and asked the company to defend them in the litigation. In each instance, Sphere Drake refused.

Accordingly, the three insureds initiated the instant declaratory judgment action in the Summit County Court of Common Pleas. For relief, the insureds requested that the trial court declare that under the terms of the two policies, Sphere Drake was required to defend them in each of the foregoing cases. The insureds also claimed damages covering the costs they had incurred as a result of having to defend themselves. In response, Sphere Drake argued, *inter alia*, that it did not have a duty to defend in any of the actions because coverage was excluded by the pollution exclusion clause in both policies.

The issues of liability and damages were separated for purposes of hearing. After a bench trial, the trial court rendered its first judgment, holding that Sphere Drake was required by the policies to provide a defense to the actions and indemnify the insureds from liability. Then, after a further hearing on the issue of damages, the court issued its second judgment, ordering Sphere Drake to pay the insureds $181,287 as damages for failing to represent them. The court further ordered Sphere Drake to assume the defense of the insureds in the two actions still pending, and to pay future costs incurred in the pending suits.

Both sides appealed. As to the issue of liability, the Ninth Appellate District affirmed the judgment of the trial court. Relying upon its earlier decision in *Buckeye Union Ins. Co. v. Liberty Solvents & Chemicals Co.* (1984), 17 Ohio App.3d 127, 17 OBR 225, 477 N.E.2d 1227, the appellate court rejected Sphere Drake's contention that coverage was barred by the pollution exclusion. As to the issue of damages, the appellate court affirmed the trial court's assessment of damages, holding that there was no right to a jury trial.

Both sides appealed to this court. In July 1991, this court granted the motion and cross-motion to certify the record.

[660] *Day, Ketterer, Raley, Wright & Rybolt* and *Matthew Yackshaw*, for appellants and cross-appellees.

Reminger & Reminger Co., L.P.A., David Ross and *Clifford C. Masch; Arter & Hadden* and *Louis Gerber*, for appellee and cross-appellant.

George Pappas Co., L.P.A., and *Dennis J. Bartek; Lord, Bissell & Brook, John B. Haarlow, Michael P. Comiskey, Daniel I. Schlessinger* and *Diane I. Jennings*, urging reversal and in support of the cross-appeal, on behalf of *amicus curiae* John Richard Ludbrook Yovell.

Wiley, Rein & Fielding, Thomas W. Brunner, Christopher D. Cerf and *Kirk J. Nahra; Montgomery, Rennie & Jonson* and *Frederick M. Morgan, Jr.*, urging reversal and in support of the cross-appeal, on behalf of *amici curiae* Insurance Environmental Litigation Association et al.

Brouse & McDowell, Frank E. Quirk, Paul A. Rose and *Keven D. Eiber; Anderson, Kill, Olick & Oshinsky, Eugene R. Anderson, Thomas H. Sear* and *Thomas G. Rozinski*, urging affirmance and in opposition to the cross-appeal on behalf of *amici curiae* city of Akron et al.

Graydon, Head & Ritchey and *John C. Greiner; Covington & Burling, William H. Allen, William F. Greaney* and *Adam M. Cole*, urging affirmance and in opposition to the cross-appeal, on behalf of *amici curiae* Ohio Manufacturers' Association et al.

Jones, Day Reavis & Pogue, Steven E. Sigalow, Kathleen B. Burke, Joseph C. Weinstein and *Charles D. Hassell,* urging affirmance and in opposition to the cross-appeal, on behalf of *amici curiae* Ohio Township Association et al.

Squire, Sanders & Dempsey, John R. Gall, David W. Alexander, Karen A. Winters and *Philomena M. Dane,* urging affirmance and in opposition to the cross-appeal, on behalf of *amici curiae* Danis Environmental Management Co. et al.

Lee I. Fisher, Attorney General, *Beverly Yale Pfeiffer* and *Ellen B. Leidner,* urging affirmance and in opposition to the cross-appeal on behalf of *amicus curiae* Lee I. Fisher.

CHRISTLEY, *J.* In their appeal before this court, the three insureds, IEL, Hybud and Budoff, have raised four issues concerning their right to a jury trial and the sufficiency of the damages award. In its cross-appeal, Sphere Drake has also raised a number of issues, the majority of which pertain to the proper interpretation of the language in the two policies.

[661] For the reasons which follow, this court finds that it is not necessary for us to address the majority of these issues, since the determination of the following single issue will control the outcome in this case. Specifically, we conclude that Sphere Drake was not under an obligation to defend the insureds in the three underlying actions because the claims in those actions were excluded from coverage by the pollution exclusion in each of the two policies. Accordingly, the judgments of both the trial and appellate courts are reversed.

I

As previously noted, in rejecting Sphere Drake's argument as to the application of the pollution exclusion in this case, the appellate court relied heavily upon its prior decision in *Buckeye Union, supra.* In that case, Liberty Solvents, the insured, was named as a defendant in an action involving the cleanup of a hazardous waste facility. The complaint in the underlying lawsuit alleged that Liberty Solvents had contracted with Chem-Dyne to dispose of its waste, and that this waste had escaped from containers and filtered into the surface water, soil, and groundwater of the surrounding area.

As in the instant case, Liberty Solvents requested that its insurer, Buckeye Union, defend it in the lawsuit. In response, Buckeye Union initiated a declaratory judgment action, seeking a determination that it was not obligated to defend under the policy.

In reversing the summary judgment in favor of Buckeye Union, the Ninth Appellate District first held that the release of pollutants and the resultant damages constituted an "occurrence"[1] to which the policy applied. In the Buckeye Union policy, the term "occurrence" was defined in the following manner:

> " ' "[O]ccurrence" means an accident, including continuous or repeated exposure to conditions, which results in *** property damage neither

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[1] In the case at bar, the policies at issue do not define the term "occurrence" as it is used in the comprehensive general liability provisions. For the purposes of this discussion, it is not necessary for us to define this term, as one analysis will focus upon the meaning of the phrase "sudden and accidental" in the exception to the pollution exclusion. In addition, the parties have not raised the question of the proper interpretation of "occurrence."

However, we note that a review of the multitude of decisions on this subject shows that the policies usually define the term, and do so in the same manner as does the Buckeye Union policy.

expected nor intended from the standpoint of the insured[.]' " *Id.*, 17 Ohio App.3d at 131, 17 OBR at 230, 477 N.E.2d at 1232.

[662] Notwithstanding the exact language of the definition, the court concluded that the term "occurrence" encompassed more than accidents, and was synonymous with the word "event." The court also emphasized that even if the release of the pollutants was intentional, the actions of the insured could still be an "occurrence" if the resulting damages were not intended or expected.

The *Buckeye Union* court then turned its attention to the pollution exclusion in the policy. The language of that provision was virtually identical to the exclusion in the policy now before this court. Essentially, the exclusion stated that the coverage did not apply to any bodily harm or property damages resulting from the release or escape of pollutants into or upon land, air or water. The final clause in the exclusion then stated that the exclusion did not apply if the release or escape is "sudden and accidental."

In analyzing the exception to the exclusion, the court began by concluding that the phrase "sudden and accidental" was ambiguous, and accordingly had to be construed against the insurer. The court then quoted from other decisions which had determined that the word "sudden" should not be interpreted as being limited to an instantaneous happening, but should cover any release or escape which was unexpected by the insured. By following this interpretation, the court read "sudden and accidental" as having the same meaning as the phrase "neither expected nor intended" in the definition of occurrence:

> " 'When viewed in light of the case law cited, the clause can be interpreted as simply a restatement of the definition of "occurrence"—that is, that the policy will cover claims where the injury was "neither expected nor intended." It is a reaffirmation of the principle that coverage will not be provided for intended results of intentional acts, but will be provided for the unintended results of an intentional act.' " *Id.* at 133, 17 OBR at 232, 477 N.E.2d at 1234, quoting *Jackson Twp. Mun. Util. Auth. v. Hartford Acc. & Indemn. Co.* (1982), 186 N.J.Super. 156, 164, 451 A.2d 990, 994.

Applying this logic to the facts of that case, the *Buckeye Union* court held that the exception to the pollution exclusion applied, since the release of pollutants had been unexpected and unintended by the insured. Accordingly, that court found that the insured was entitled to a defense and indemnity in the underlying lawsuit. (The court also found an obligation to indemnify, but that issue was not argued on appeal.)

II

During its discussion of the pollution exclusion, the *Buckeye Union* court stated that the "overwhelming authority from other jurisdictions" supported [663] its interpretation of the "sudden and accidental" phrase. *Id.*, 17 Ohio App.3d at 132, 17 OBR at 231, 477 N.E.2d at 1234. While this may have been true in 1984, recent decisions have rejected the holding of *Buckeye Union*.

A prime example of this recent trend is the decision of the North Carolina Supreme Court in *Waste Mgt. of Carolinas, Inc. v. Peerless Ins. Co.* (1986), 315 N.C. 688, 340 S.E.2d 374. There, the insured was engaged in the business of hauling waste materials and disposing of them in a local landfill. When the owners of the landfill were sued by the United States, the insured was added as a third-party defendant. As in the instant case, when its insurer refused to defend it, the insured brought a declaratory judgment action.

Upon reviewing the language of the pollution exclusion and the definition of "occurrence," the Supreme Court of North Carolina held that the provisions were not ambiguous because the language could reasonably be interpreted in only one manner:

> "We do not perceive these provisions to be either ambiguous or, except for the repeated appearance of 'accident,' redundant. In our view, this is an instance where nontechnical words (except for 'occurrence,' which is defined in the policy) can be given the same meaning they usually receive in ordinary speech. Nor does their context require us to do otherwise." (Footnote omitted.) *Id.* at 694, 340 S.E.2d at 379.

The North Carolina court then went on to conclude that the word "sudden" had to be interpreted as having a *temporal* aspect, and that it could not be read to include releases which occur over a long period of time: "The exception also describes the event—not only in terms of its being unexpected, but in terms of its happening instantaneously or precipitantly." *Id.* at 699, 340 S.E.2d at 382.

Turning to the specific facts before it, the *Waste Mgt.* court first held that while the actual dumping of the waste could not be considered an "occurrence" as defined in the policy because it had been done intentionally, the leakage of the waste did constitute an "occurrence" because it had been both unexpected and unintended. However, the insured was still not entitled to a defense because the pollution exclusion was certainly applicable to the leakage of the waste. Moreover, the court held that the exception to the exclusion did not apply because the underlying *complaint never stated* or implied that the release of the waste had occurred suddenly.

Other state supreme courts have also held that the word "sudden" in the exception must be interpreted as having a temporal aspect. See, *e.g.*, *Upjohn Co. v. New Hampshire Ins. Co.* (1991), 438 Mich. 197, 476 N.W.2d 392; *Lumbermens Mut. Cas. Co. v. Belleville Indus., Inc.* (1990), 407 Mass. 675, 555 N.E.2d 568.

[664] In addition to the plain and ordinary meaning of the word, some courts have placed heavy emphasis upon the fact that "sudden" *would not have any* meaning in the exception if it were not interpreted to also mean "quick" or "abrupt." These courts have recognized that the word "accidental" also means unexpected:

> "For the word 'sudden' to have any significant purpose, and not to be surplusage when used generally in conjunction with the word 'accidental,' it must have a temporal aspect to its meaning, and not just the sense of something unexpected. We hold, therefore, that when used in describing a release of pollutants, 'sudden' in conjunction with 'accidental' has a temporal element. The issue is whether the release was sudden. The alternative is that it was gradual. If the release was abrupt and also accidental, there is coverage for an occurrence arising out of the discharge of pollutants." *Id.*, 407 Mass. at 680, 555 N.E.2d at 572.

In addition to state courts, many federal courts have rejected the *Buckeye Union* interpretation of the word "sudden." Of particular interest is a series of decisions of the Sixth Circuit Court of Appeals. In applying state principles of contract interpretation, the circuit court has consistently interpreted the word in the same manner as

in *Waste Mgt., supra.* See *Grant-Southern Iron & Metal Co. v. CNA Ins. Co.* (C.A.6, 1990), 905 F.2d 954; *FL Aerospace v. Aetna Cas. & Sur. Co.* (C.A.6 1990), 897 F.2d 214; *United States Fid. & Guar. Co. v. Star Fire Coals, Inc.* (C.A.6, 1988), 856 F.2d 31.

In the latter decision, the circuit court specifically rejected the argument that the pollution exclusion was ambiguous. To emphasize this point, the court quoted *Am. Motorist Ins. Co. v. Gen. Host Corp.* (D.Kan. 1987), 667 F.Supp. 1423, 1429: "We fully agree with the conclusion that this 'language is clear and plain, something only a lawyer's ingenuity could make ambiguous.' " *Star Fire Coals, supra,* at 34. As to the proper definition of the word "sudden," the court then stated:

> "We believe the everyday meaning of the term 'sudden' is exactly what this clause means. We do not believe that it is possible to define 'sudden' without reference to a temporal element that joins together conceptually the immediate and the unexpected." *Id.*

Besides the Sixth Circuit, other federal appellate courts have followed this interpretation of the word "sudden." See, *e.g., A. Johnson & Co., Inc. v. Aetna Cas. & Sur. Co.* (C.A.1 1991), 933 F.2d 66; *New York v. Amro Realty Co.* (C.A.2, 1991), 936 F.2d 1420.

Finally, at least one court has predicted that this court would not follow *Buckeye Union.* In *Borden, Inc. v. Affiliated FM Ins. Co.* (S.D.Ohio 1987), 682 F.Supp. 927, the court reviewed our previous pronouncements concerning [665] the proper manner of interpreting insurance contracts, and then rejected the *Buckeye Union* analysis on the ground that the exclusion was unambiguous. The court went on to conclude that in its common usage, "sudden" means "happening without previous notice or with very brief notice." *Id.* at 930.

III

As the *Borden* court correctly noted, this court has consistently held that insurance contracts must be construed in accordance with the same rules as other written contracts. *Universal Underwriters Ins. Co. v. Shuff* (1981), 67 Ohio St.2d 172, 21 O.O.3d 108, 423 N.E.2d 417; *Rhoades v. Equitable Life Assur. Soc. of the United States* (1978), 54 Ohio St.2d 45, 8 O.O.3d 39, 374 N.E.2d 643.

In applying these rules, we have stated that the most critical rule is that which stops this court from rewriting the contract when the intent of the parties is evident, *i.e.*, if the language of the policy's provisions is clear and unambiguous, this court may not "resort to construction of that language." *Karabin v. State Auto. Mut. Ins. Co.* (1984), 10 Ohio St.3d 163, 167, 10 OBR 497, 499, 462 N.E.2d 403, 406. In *Tomlinson v. Skolnik* (1989), 44 Ohio St.3d 11, 12, 540 N.E.2d 716, 717-718, this court expounded upon this rule further:

> "*** Thus, in reviewing an insurance policy, words and phrases used therein 'must be given their natural and commonly accepted meaning, where they in fact possess such meaning, to the end that a reasonable interpretation of the insurance contract consistent with the apparent object and plain intent of the parties may be determined.' " (Quoting *Gomolka v. State Auto. Mut. Ins. Co.* [1982], 70 Ohio St.2d 166, 167-168, 24 O.O.3d 274, 275-276, 436 N.E.2d 1347, 1348.)

In reaching its decision, the *Buckeye Union* court aptly noted that under the case law of this state, an exclusion in an insurance policy will be interpreted as applying only to that which is *clearly* intended to be excluded. See, *e.g.*, *Moorman v. Prudential Ins. Co.* (1983), 4 Ohio St.3d 20, 21, 4 OBR 17, 19, 445 N.E.2d

1122, 1124. However, the rule of strict construction does not permit a court to change the obvious intent of a provision just to impose coverage.

Applying these rules of construction to policy language in this case, this court concludes that the analysis of the exception to the pollution exclusion in *Buckeye Union* is incorrect. Specifically, we hold that the word "sudden" in the exception is *not* synonymous with the word "unexpected" in the typical definitions of "occurrence"; instead, the word also has a *temporal* aspect. We reach this conclusion for three reasons.

[666] First, and foremost, like the courts in *Borden* and *Waste Mgt.,* this court finds that the word "sudden," as well as the remainder of the exception, is not ambiguous in the context of the entire exclusion. As it is most commonly used, "sudden" means happening quickly, abruptly, or without prior notice. This is the plain and ordinary meaning of the word, and the context in which it is employed does not indicate that it should be given any other meaning.

Second, we agree with the court in *Belleville Indus., supra,* that unless "sudden" is interpreted to have a temporal aspect, the word does not add anything to the phrase "sudden and accidental." In its common, ordinary use, the word "accidental" means unexpected, as well as unintended. Under the *Buckeye Union* interpretation, "sudden" has the same meaning, and accordingly serves no purpose in the phrase. However, "[i]n construing a written instrument, effect should be given to all of its words, if this can be done by any reasonable interpretation." *Wadsworth Coal Co. v. Silver Creek Mining & Ry. Co.* (1884), 40 Ohio St. 559, paragraph one of the syllabus.

Third, if "sudden" were interpreted to be synonymous with "unexpected," then the entire pollution exclusion would not serve the purpose for which it was clearly included. This is because, under *Buckeye Union*, the pollution exclusion would exclude only bodily injury or property damage that was already excluded by the common definition of "occurrence."

As previously noted, the typical definition of "occurrence" in an insurance policy is an accident that results in injury or damage which the insured did not intend or expect. That definition also states that an accident includes continuous or repeated exposure to a condition. Accordingly, under this definition, it does not matter whether the accident happened quickly or gradually; it would still be considered an "occurrence" if it resulted in bodily injury or property damage.

From this broad coverage, the pollution exclusion then excluded those injuries or damages which resulted from pollution or contamination. In doing so, the exclusion did not distinguish between damages caused by a gradual release or discharge and those damages caused by an abrupt release or discharge.

Under the definition of "sudden" now adopted by this court in the present case, the exception to the exclusion covers only those damages in the latter category, *i.e.*, those caused by an abrupt release. However, if "sudden" were construed so that it could also mean "unexpected" and the exception were construed to be just a restatement of the definition of "occurrence," then the exception would cover both categories, *i.e.*, gradual and abrupt. Because such an interpretation would render the entire exclusion meaningless, it is neither acceptable nor desirable under the normal rules of contract construction. [667] *Farmers Natl. Bank v. Delaware Ins. Co.* (1911), 83 Ohio St. 309, 94 N.E. 834, paragraph six of the syllabus.

As an aside, we note that public policy also supports our interpretation of the word "sudden." Under the *Buckeye Union* interpretation, only an intentional polluter was excluded from coverage. Such an interpretation might encourage the polluter to be less than diligent, as merely negligent acts would be covered under the policy. See *Waste Mgt., supra,* 315 N.C. at 697-698, 340 S.E.2d at 381. In contrast, today's holding encourages diligence by placing the financial burden for gradual or long-term pollution upon the entity best able to foresee and stop it.

However, we reiterate that the primary basis for our holding is the lack of ambiguity in the wording of the exception. The inclusion of the word "sudden" readily indicates that the exception was not intended to apply to a release that occurred over an extended time. As one court has noted, the intent behind the "sudden and accidental" exception was to *limit* coverage for pollution-related damages to those events in which "damages are caused by sudden pollution incidents involving equipment malfunctions, explosions and the like." *Claussen v. Aetna Cas. & Sur. Co.* (S.D.Ga. 1987), 676 F.Supp. 1571, 1580. Any other interpretation conflicts with the clear language and intent of the provision.

IV

The application of the foregoing holding to the facts of this case is a relatively simple exercise. The first two complaints related to the operation of the Industrial Excess Landfill. Both complaints alleged that over an extended period of time, the insureds had either disposed of or accepted a variety of wastes in the landfill. The third complaint, which applied only to Hybud, stated that the insured had deposited various wastes into the Montville Landfill over an extended period of time.

Clearly, each of the three complaints alleged that the resulting injuries and damages had been caused by the deposited waste. These allegations accordingly brought the causes of action within the scope of the pollution exclusion.

Moreover, a review of the complaints shows that there was never any allegation that the release or discharge of the waste happened abruptly or instantaneously. Thus, the exception to the exclusion was not invoked. Under these circumstances, the three insureds were not entitled under the two policies to a defense from Sphere Drake. Thus, the specific allegations of the complaints precluded coverage for the resulting damage.

V

In addition to arguing in favor of the *Buckeye Union* interpretation of the pollution exclusion, the insureds contend that Sphere Drake should not have been permitted to raise this issue at the trial level. Specifically, the insureds argue that Sphere Drake waived the exclusion by failing to raise it in its prelitigation letter denying coverage under the policies.

As to this issue, this court notes that as a general proposition, the doctrine of waiver cannot be employed to expand the coverage of a policy. 16B Appleman, Insurance Law and Practice (1981) 579, Section 9090. This rule has been applied when coverage is expressly excluded under the terms of the policy. *Hartory v. State Auto. Mut. Ins. Co.* (1988), 50 Ohio App.3d 1, 552 N.E.2d 223.

As set forth in Appleman, *supra,* the doctrines of waiver and estoppel have been applied to rights of the insurer set forth in the policy. These rights may affect whether coverage will be found in a particular situation but can not define the basic scope of the coverage. An example of this is the company's right to timely notification of a possible claim.

This latter rule is clearly based upon public policy and equity considerations. It is the opinion of this court that these considerations do not warrant the extension of the waiver doctrine to exclusions in the policy. A company should not be obligated to cover a risk for which it did not contract. Therefore, Sphere Drake did not waive its right to invoke the pollution exclusion by not raising it in its denial letter.

VI

For the foregoing reasons, Sphere Drake was not obligated to provide a defense for the three insureds in the underlying complaints. The judgment of the court of appeals is reversed.

Judgment reversed.

Moyer, *C.J.*, Sweeney, Douglas, Wright, H. Brown and Resnick, *JJ.*, concur.

Judith A. Christley, *J.*, of the Eleventh Appellate District, sitting for Holmes, *J.*

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO

(Dated September 16, 1992)

Case No. 91-641

THE SUPREME COURT OF OHIO

HYBUD EQUIPMENT CORPORATION, *et al.*,
Appellants/Cross-Appellees,

v.

SPHERE DRAKE INSURANCE COMPANY, INC.,
Appellee/Cross-Appellant.

APPEAL AND CROSS-APPEAL FROM
THE COURT OF APPEALS

JUDGMENT ENTRY

This cause, here on appeal and cross-appeal from the Court of Appeals for Summit County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is reversed consistent with the opinion rendered herein.

It is further ordered that the appellee/cross-appellant recover from the appellants/cross-appellees its costs herein expended; and that a mandate be sent to the Court of Common Pleas for Summit County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Summit County for entry.

COSTS:

Motion Fee, $40.00, paid by Day, Ketterer, Raley, Wright & Rybolt.

Motion Fee, $40.00, paid by Reminger & Reminger.

(Court of Appeals No. 14597)

/s/ THOMAS J. MOYER
Chief Justice

DECISION AND JOURNAL ENTRY OF THE COURT OF APPEALS NINTH JUDICIAL DISTRICT, SUMMIT COUNTY, OHIO

(Dated January 30, 1991)

C.A. No. 14597

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO)
) ss:
COUNTY OF SUMMIT)

HYBUD EQUIPMENT CORP., *et al.,*
Plaintiffs-Appellees,

v.

SPHERE DRAKE INS. CO.,
Defendant-Appellant.

APPEAL FROM JUDGMENT ENTERED IN
THE COMMON PLEAS COURT
COUNTY OF SUMMIT, OHIO
CASE NO. CV 88 8 2642

DECISION AND JOURNAL ENTRY

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

Cacioppo, J. Plaintiffs-appellees-cross-appellants, Hybud Equipment Company (Hybud), Industrial Excess Landfill (IEL) and Hyman Budoff (collectively appellees), contracted with Sphere Drake Insurance Company (Sphere) for two comprehensive general liability insurance policies. The first policy insured the appellees from July 30, 1985 to July 30, 1986, while the second policy covered the period from June 30, 1986 to June 30, 1987.

On or about November 18, 1987, Linda Putinski filed suit in United States District Court, primarily alleging that the appellees were liable to her for compensatory and punitive damages arising out of bodily injury and property damage resulting from the exposure and threatened exposure to pollutants discharged from the Industrial Excess Landfill site.

On December 9, 1987, the United States Environmental Protection Agency (USEPA) issued an administrative order requiring appellees to undertake remedial design and remedial action at the Industrial Excess Landfill site to abate dangers arising from the release of substances from the site. Additional orders were issued, requiring the appellees' participation in administrative hearings concerning liability and damages for pollution.

In June of 1988, the Ohio Attorney General commenced an action in Medina County Common Pleas Court as a result of alleged hazardous waste releases at the Montville Landfill. Hybud was named as a third-party defendant in this case.

Upon becoming aware of the Putinski, USEPA and Montville actions, appellees notified Sphere. Sphere refused to indemnify and defend the appellees for the costs and expenses of the actions. As a result, appellees brought suit in Summit County Common Pleas Court requesting monetary damages for the cost and expense of defending the actions; a declaratory judgment that Sphere had a duty to defend; an order requiring the payment and indemnification of future defense costs incurred in the actions; an award of damages for the costs and expenses in the case at bar; and all other relief the court found just and equitable. The trial court found that Sphere had a duty to defend appellees and awarded damages in the amount of $181,287.00

Assignments of Error

> "I. The trial court erred in finding the underlying claims presented in the Putinski, USEPA and Montville actions involved occurrences which took place during the course of the effective dates of the Sphere Drake policies.
>
> "II. The trial court erred in finding that the underlying claims presented in the Putinski, USEPA and Montville actions were not excluded from coverage as being expected or intended from the standpoint of the insured.
>
> "III. The trial court erred in finding that the claims alleged in the Putinski, USEPA, and Montville actions were not excluded from coverage pursuant to the terms of the standard pollution exclusion contained in both policies.
>
> "IV. The trial court erred in finding that the claims presented in the Putinski, USEPA, and Montville cases were not excluded from coverage pursuant to the terms of the absolute pollution exclusion contained in both policies."

As these assignments of error are interrelated, they will be addressed together.

In its first assignment of error, Sphere contends that the circumstances underlying the Putinski, USEPA and Montville actions were such that they did not constitute "occurrences" within the meaning of the policies. In *Buckeye Union Ins. Co. v. Liberty Solvents & Chemicals Co.* (1984), 17 Ohio App. 3d 127, at 131, this court interpreted the term "occurrence" to encompass a period of time, rather than a sudden or momentary sense. Under the interpretation adopted by the *Liberty Solvents* court, occurrence has a much broader meaning than the term accident in that accident refers to something that came about or happened in a certain way, while occurrence means something that happened or came about in any way. *Id.* Occurrence has also been viewed as a synonym for event; applying to anything that happens or occurs. *Portaro v. American Guarantee & Liability Ins. Co.* (N.D. Ohio 1962), 210 F. Supp. 411, 415.

In light of the principles set forth in *Liberty Solvents,* we find the appellant's contentions in the first assignment of error to be without merit. As in *Liberty Solvents, supra,* at 132, the releases and threatened releases of hazardous waste materials alleged in the underlying actions are occurrences within the common understanding of the term. The term occurrence is to be broadly construed in favor of extending coverage to the insured. *Id.* While the releases and threatened releases alleged in the underlying actions most likely occurred over a period of time, appellant has failed to establish that the releases in question were not occurrences covered by the policy and to sufficiently distinguish the case *sub judice* from *Liberty Solvents.* Thus, under the broad interpretation of the term occurrence adopted by this court, the trial court could properly conclude that the circumstances in the underlying actions constituted occurrences covered by the policies, within the time period the policies were in force. Accordingly, the first assignment of error is overruled.

In Sphere's second and third assignments of error, it contends that coverage was excluded as the underlying claims were expected or intended, and were not sudden and accidental within the exception to the standard pollution exclusion.

The phrase "sudden and accidental" can be interpreted simply as a restatement of the definition of occurrence, that is, that the policy will cover claims where the injury was neither expected nor intended. *Liberty Solvents, supra,* at 132. As such, the determination of what is "sudden and accidental" necessarily entails the same analysis as the determination of whether something is expected or intended.

The phrase "sudden and accidental" is a reaffirmation of the principle that coverage will not be provided for intended results of intentional acts, but will be provided for the unintended results of intentional acts. *Id.* at 133. As stated in *Liberty Solvents, supra,* at 134,

> "*** If the inquiry is, as it should be, whether the pleadings charged the insured with an act resulting in unintended or unexpected damage, then the act or acts are sudden and accidental regardless of how many deposits or dispersals may have occurred, and although the permeation of pollution into the ground water may have been gradual rather than sudden, the behavior of the pollutants as they seeped into the aquifer is irrelevant if the permeation was unexpected.***"

The term sudden should not be limited to an instantaneous happening, and should be given a construction most favorable to the insured. *Id.* Regardless of the initial intent or lack thereof as it relates to causation, or the period of time involved, if the resulting damage could be viewed as unintended by the factfinder, the total situation can be deemed an accident. *Id.*

We have reviewed the record and conclude that there was a sufficient basis upon which the trial court could properly conclude that the underlying claims were sudden and accidental and not expected or intended. Under the framework provided by this court in *Liberty Solvents,* the events in question could have properly been found to be sudden and accidental and not expected or intended, thus giving rise to a duty to defend. Accordingly, the second and third assignments of error are without merit and are overruled.

In its fourth assignment of error, Sphere contends that coverage was excluded by an absolute pollution exclusion contained in both policies. The trial court found that the evidence as to the existence or nonexistence of the absolute exclusion endorsement was "in equipoise". The record supports this conclusion. A defendant insurer has the burden to prove that a limitation, exclusion or exception was a part of the insurance policy or contract, *Continental Ins. Co. v. Louis Marx & Co.* (1980), 64 Ohio St. 2d 399, syllabus; *Barnes v. Motorists Mut. Ins. Co.* (1971), 29 Ohio App. 2d 167, and to do so by the preponderance of the evidence. *Barnes, supra,* at 170. In the case at bar, the record indicates that Sphere simply failed to carry this burden. The fourth assignment of error is overruled.

Assignment of Error V

> "The court erred in finding that the claims presented in the USEPA action were not excluded from coverage, in whole or in part, to the Sphere Drake policies."

In this assignment of error, appellant contends that coverage under the policies is excluded by a provision which excludes coverage for property damage to property owned or rented by the insured. From this premise, appellant concludes that it does not have a duty to defend and is not liable for damages in the USEPA action.

A review of the administrative orders in the USEPA action reveals that the investigation and action taken by the USEPA was taken to "protect public health" and "to mitigate the imminent and substantial endangerment posed by actual and threatened releases into the environment of hazardous substances from the facility." The USEPA documents indicate a general intent on the part of the USEPA to protect those in the vicinity from possible contamination from the Industrial Access Landfill. As such, the trial court could properly conclude that the USEPA action was not excluded by the aforementioned exclusion.

The fifth assignment of error is overruled.

Cross-Appellant's Assignment of Error I

> "The trial court erred in refusing to allow a jury to consider the damages issues in this case.

The complaint and amended complaints in the case at bar requested a declaratory judgment establishing Sphere's duty to defend; damages for monies expended by the appellees in conducting their own defense; an order demanding the payment of future defense costs; an award of expenses incurred in the case at bar; and, other relief that the trial court would deem proper and equitable.

In *Murello Constr. Co. v. Citizens Home Savings Co.* (1985), 29 Ohio App. 3d 333, 334, this court held that the right to a jury trial is dependent upon whether the legal cause of action is predominant. An action for a declaratory judgment is *sui generis* in the sense that it is neither strictly in equity nor at law, but, instead, a purely procedural remedy wherein a court may apply the principles of law or equity necessary to adjudicate the issue presented. *Gannon v. Perk* (1976), 46 Ohio St. 2d 201.

In *Erie Insurance Group v. Fisher* (1984), 15 Ohio St. 3d 380, at 383, the Ohio Supreme Court held that:

> "*** [A] declaratory judgment action filed by an insurer against an insured, the purpose of which is to construe an insurance policy and determine the insurer's obligations to the insured, and is not for the purpose of determining liability in an action for the recovery of money, is properly triable to the court."

While *Fisher* dealt with an insurer bringing the action rather than the insured we find its principles to be applicable to the case at bar.

A review of the case at bar demonstrates that the primary purpose of the action was to construe the contracts of insurance in order to determine whether Sphere had a duty to defend. Accordingly, under the principles set forth by this court in *Murello* and the Supreme Court of Ohio in *Fisher,* the entire case was properly triable to the trial court.

We find the first cross assignment of error to lack merit and it is hereby overruled.

Cross Assignments of Error II and III

> "II. The trial court erred in failing to award plaintiffs compensatory damages against defendant other than the defense costs of the underlying cases and the prosecution costs of the instant case when the evidence clearly indicates that additional substantial damages were suffered by the plaintiffs in this case on account of defendant's failure to defend plaintiffs in the underlying cases.
>
> "III. The trial court erred in failing to award plaintiffs punitive damages against defendant when the evidence clearly and indisputably showed that defendant solely relied on a false statement for denying their [sic] defense obligation to the plaintiffs and other evidence justifies punishing the defendant."

In these cross-assignments of error, the appellees contend that the trial court erred in failing to award them additional compensatory and punitive damages. We do not agree.

It is instructive to note that the second amended complaint sought damages for the expenses incurred, and to be incurred, in defending the underlying suits. Appellees did not seek to amend their demand until March 28, 1990, after the liability portion of the bifurcated trial and the court's entry establishing liability. The amended demand preceded the damages portion of the case, which began April 9, 1990. The amended demand for judgment sought $1,000,000.00 in compensatory damages and $3,000,000.00 in punitive damages. Civ. R. 54(C) provides in part:

> "*** a demand for judgment which seeks a judgment for money shall limit the claimant to the sum claimed in the demand unless he amends his demand not later than seven days before the commencement of the trial.***"

While the amended demand in the case at bar preceded the damages portion of the case, it clearly was not timely in light of the interdependency between the issues involved in the two portions of the trial. Accordingly, as the amended demand has to be filed at least seven days prior to the commencement of the portion of the trial concerning liability, the appellees were limited to the damages requested in the second amended complaint.

The second and third cross-assignments of error are overruled.

Cross Assignment of Error IV

> "The trial court erred in awarding defendant a $60,896.51 credit for money paid by other insurance companies towards the defense costs of the underlying actions."

The collateral source rule is defined as follows:

> "*** if an injured person receives compensation for his injuries from a source wholly independent of the tort-feasor, the payment should not be deducted from the damages which he would otherwise collect from the tort-feasor.*** In other words, a defendant tortfeasor may not benefit from the fact that the plaintiff has received money from other sources as a result of the defendant's tort, e.g. sickness and health insurance." Black's Law Dictionary (5 Ed. Rev. 1979) 238.

The case for the application of the collateral source rule in contract cases is less compelling than in tort cases; the rationale being that one should not profit more from the breach of an obligation than from its full performance. 22 American Jurisprudence 2d (1988) 641, Damages, Section 570. The case at bar was based on contract, rather than tort. While the case at bar was not a breach of contract action, we find the aforementioned principles to be applicable under the facts and circumstances of the case and do not believe that the collateral source rule was applicable.

The fourth cross-assignment of error is overruled.

The judgment of the trial court is affirmed as to the liability portion of the case. The trial court's assessment of damages is reversed and remanded for a determination by a jury.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Summit Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellees.

Exceptions.

/s/ MARY CACIOPPO
For the Court

REECE, *P. J.*
BAIRD, *J.*
Concur

Appearances:

MATTHEW YACKSHAW, Attorney at Law, 800 William R. Day Bldg., 121 Cleveland Ave., S., Canton, OH 44702 for Plaintiffs.

DAVID ROSS and CLIFFORD C. MASCH, Attorneys at Law, 113 St. Clair Bldg., Cleveland, OH 44114 for Defendant.

EUGENE R. ANDERSON, THOMAS H. SEAR, and THOMAS G. ROZINSKI, Attorneys at Law, 666 Third Ave., New York, NY 10017 for Amicus Curiae.

FRANK E. QUIRK, PAUL A. ROSE, and KEVIN D. EIBER, Attorneys at Law, 500 First Nat'l. Tower, Akron, OH 44308 for Amicus Curiae.

JOURNAL ENTRY OF THE COURT OF APPEALS, NINTH JUDICIAL DISTRICT, SUMMIT COUNTY, OHIO

(Filed January 30, 1991)

C.A. No. 14597

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO)
) ss:
COUNTY OF SUMMIT)

HYBUD EQUIPMENT CORP., *et al.*,
Plaintiffs-Appellees,

v.

SPHERE DRAKE INS. CO.,
Defendant-Appellant.

JOURNAL ENTRY

The last sentence of the journal entry dated January 30, 1991 reversing and remanding the above case for a determination of damages by a jury should be corrected to read:

The trial court's assessment of damages is affirmed.

Costs taxed to appellant.

/s/ Mary Cacioppo
Judge

John W. Reece
Judge

William R. Baird
Judge

cc:

Matthew Yackshaw, Attorney at Law, 800 William R. Day Bldg., 121 Cleveland Ave., S. Canton, OH 44702 for Plaintiffs.

David Ross and Clifford C. Masch, Attorneys at Law, 113 St. Clair Bldg., Cleveland, OH 44114 for Defendant.

Eugene R. Anderson, Thomas H Sear, and Thomas G. Rozinski, Attorneys at Law, 666 Third Ave., New York, NY 10017 for Amicus Curiae.

Frank E. Quirk, Paul A. Rose, and Kevin D. Eiber, Attorneys at Law, 500 First Nat'l. Tower, Akron, OH 44308 for Amicus Curiae.

ORDER OF THE COURT OF COMMON PLEAS

(Filed June 30, 1989)

Case No. CV 88 8 2642

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

HYBUD EQUIPMENT CORP., *et al.*,
Plaintiffs,

v.

SPHERE-DRAKE INSURANCE COMPANY,
Defendant.

ORDER

JUDGE MORGAN

At the trial scheduled for July 6, 1989, the Court will hear that portion of the Complaint which is the Declaratory Judgment portion of the pleading and determine the duty to defend under the policy. See *Erie Insurance Group v. Fisher* (1984), 15 Ohio St. 3d 380.

Thereafter, if necessary, trial will be fixed at a later date with respect to claims for a jury trial involving money damages.

JUDGE GLEN B. MORGAN

cc:
ATTORNEY JOHN R. WERREN
ATTORNEY DAVID ROSS

FINDINGS, DECISION AND JOURNAL ENTRY OF THE COURT OF COMMON PLEAS

(Filed February 7, 1990)

Case No. CV 88 08 2642

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

HYBUD EQUIPMENT CORPORATION, *et al.*,
Plaintiffs,

vs.

SPHERE DRAKE INSURANCE CO., LTD.,
Defendant.

JUDGE MORGAN

FINDINGS, DECISION AND JUDGMENT ENTRY

This matter was heard by the Court without a jury on July 6, 1989. The Plaintiffs, Hybud Equipment Corporation and Industrial Excess Landfill, Inc., are corporations in the state of Ohio. The evidence establishes that they purchased policies of general liability insurance for two consecutive years beginning July 30, 1985 and ending July 30, 1986; for the period June 30, 1986 to June 30, 1987.

Subsequently, on or about November 18, 1987, the Plaintiffs were sued by Linda Putinski in Case No. C87-3011A in the United States District Court, Northern District of Ohio. That case was voluntarily dismissed after Plaintiffs incurred expenses of $13,568.80. The Defendant Sphere Drake refused to indemnify or defend the Plaintiffs in that lawsuit.

On December 9, 1987, the United States Environmental Protection Agency issued an administrative order under 42 U.S.C., Section 9606(a), requiring Plaintiffs to undertake remedial design and remedial action at the Industrial Excess Landfill cite [sic] located in Uniontown, Ohio to abate an alleged imminent and substantial endangerment arising from the release or threat of a release of hazardous substances allegedly present at the site.

Various other orders were issued by such agency in 1988 which required participation in administrative proceedings by the Plaintiffs on the issue of liability and damages for pollution. The Defendant has refused to indemnify or defend Plaintiffs from such administrative proceedings and costs and expenses have been incurred.

Subsequently, in June of 1988, the Plaintiffs were sued in the Common Pleas Court for Medina County by the Ohio Attorney General in Case Number 42595 on the docket of said Court as a result of alleged hazardous waste releases at the Montville Landfill.

Defendant refuses to indemnify and defend the Plaintiffs from the costs and expenses in that lawsuit.

The Plaintiffs' prayer requests monetary damages for the cost and expense of defense in the above lawsuits incurred to date; a declaratory judgment that Defendant has a duty to defend Plaintiffs in the matters described in the Second Amended Complaint; an order upon the Defendant requiring the payment and indemnification of all defense costs in the future; an award of damages for the costs and expense incurred in the within lawsuit and, all equitable relief to which Plaintiffs are entitled.

The central issue in this case is whether or not at the time issued, the two policies of liability insurance sold to Plaintiff by Defendant had attached thereto an all inclusive hazardous waste coverage exclusion.

Although each of the policies contain a general exclusion wherein the policies do not apply to property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere or any water course or body of water, unless such discharge, dispersal or release is sudden and accidental, it was specifically held by the Court of Appeals for the Ninth District in *Buckeye Union Ins. Co. v. Liberty Solvents & Chemical Co., Inc.* (1984), 17 Ohio App. 3d 127, that:

> "*** the release of chemical pollutants which cause the damage as alleged in the complaint is an occurrence for which coverage may be afforded in the policy."

That policy had the identical exclusion as did the two policies issued by Sphere Drake to the Plaintiffs Hybud Equipment Corporation, et al. Thus, that general exclusion in the body of these policies would not permit Sphere Drake to escape liability for indemnification and defense as otherwise provided for in the liability policy.

Therefore, unless there is another exclusion by endorsement in the policy applicable to the subject litigation, Sphere Drake Insurance Company, Ltd. is required to defend and indemnify the Plaintiffs from liability for hazardous waste claims.

The Defendant argues that when the two polices [sic] were issued respectively effective on July 30, 1985 and June 30, 1986, it was understood and agreed between the

Plaintiffs and Ostrov Corporation and Sphere Drake Insurance Company that these policies were not intended to provide coverage or otherwise obligate Sphere Drake to defend any environmental/pollution claim against Hybud, et al.

The Defendant Sphere Drake Insurance Company claims that such pollution claims were specifically excluded from the two policies by an absolute pollution exclusion endorsement which was attached to each of the policies.

The evidence is in dispute as to whether or not a written absolute pollution and/or contamination exclusion endorsement was in fact attached to either of the insurance policies which are a subject of this lawsuit.

The evidence is in dispute as to whether or not the Plaintiffs had any notice whatsoever, be it written or verbal notice, as to any such absolute pollution exclusion endorsements.

The law casts upon the insurer the burden of proof with respect to excepted risks and to limitations and requires it to establish its defense in such respect. *New York Life Insurance Co. v. LaBoiteaux,* 5 Ohio Dec. Reprint 242.

Consequently, where there is a general provision setting forth the obligation under a policy and then a provision in the nature of an exception to such general provision, the plaintiff is not required to traverse such exception and to prove the negative, but the duty is upon the defendant to plead such exception and to prove facts necessary to bring the case within the exception. *Order of United Commercial Travelers v. Watkins,* 38 Ohio App. 420; *John Hancock Mutual Life Ins. Co. v. Hicks,* 43 Ohio App. 242.

The evidence as to whether or not the alleged written absolute pollution or hazardous waste exclusion endorsement was attached to the written policies issued to Plaintiffs by Sphere Drake is in equipoise. Also, Defendant had failed to establish by the preponderance of the evidence that Defendant gave Plaintiffs verbal notification that the policies excluded liability coverage for liability arising out of hazardous waste pollution.

When an insurance company denies liability under an insurance policy on the basis of an exclusion contained in the policy, the insurance company must prove by the preponderance of the evidence that the insured was given notice of the exclusion. *Kathryn Marshall, et al. v. Motorists Insurance* (C.A. 13333, Ninth District, Unreported, 1988).

Wherefore, the Court determines and declares that the Defendant Sphere Drake Insurance Company, Ltd. has a duty to defend Plaintiffs in the matters described in the Amended Complaint with respect to claims arising during the policy period. The Court reserves judgment as to whether or not there is any duty to indemnify and defend with respect to claims arising by reason of acts which occurred prior to July 30, 1985 or after June 30, 1987.

It is further the order of this Court that this case shall be set down for hearing on the question of damages with respect to indemnification and defense costs incurred, and for such other relief which it may be entitled to in the premises.

/s/ GLEN B. MORGAN
Judge

cc:
ATTORNEY DAVID ROSS
ATTORNEY MATTHEW YACKSHAW

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS

(Filed April 30, 1990)

Case No. CV 88 08 2642

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

HYBUD EQUIPMENT CORPORATION, *et al.*,
Plaintiffs,

v.

SPHERE DRAKE INSURANCE CO., LTD.,
Defendants.

JUDGE MORGAN

JUDGMENT ENTRY

This action came on for trial before the Court, and the issues having been duly tried and a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED that the Plaintiffs Hybud Equipment Corporation, Industrial Excess Landfill, Inc. and Hyman Budoff recover of the Defendant Sphere Drake Insurance Co., Ltd. the sum of $181,287.00, with subsequent interest thereon at the statutory rate.

IT IS FURTHER ORDERED AND ADJUDGED that Defendant assume the defense of Plaintiffs with respect to the USEPA claims, including the case styled *United States v. Industrial Excess Landfill, Inc., et al.*, Case No. 5:89CV1988 (USDC ND Ohio).

IT IS FURTHER ORDERED AND ADJUDGED that Defendant assume the defense of Plaintiff Hybud Equipment Corporation in the case styled *State of Ohio v. William F. Campbell, et al., v. County of Medina et al.*, Case No. 42595 (Medina County Common Pleas Court).

IT IS FURTHER ORDERED AND ADJUDGED that Defendant pay the prosecution costs in this case incurred or to be incurred after March 31, 1990.

Dated at Akron, Ohio this 30th day of April, 1990.

/s/ GLEN B. MORGAN
Judge, Court of Common Pleas

APPROVED:

/s/ MATTHEW YACKSHAW
Attorney for Plaintiffs

DAVID ROSS
Attorney for Defendant

JOURNALIZED this ______ day of April, 1990.

DIANA ZALESKI
Clerk of Court

By: ________________, Deputy Clerk

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE COURT OF COMMON PLEAS

(Filed May 7, 1990)

Case No. CV 88 08 2642

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

HYBUD EQUIPMENT CORPORATION, *et al.*,
Plaintiffs,

v.

SPHERE DRAKE INSURANCE CO., LTD.,
Defendants.

JUDGE MORGAN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was heard by the Court without a jury on April 9, 1990 and April 11, 1990, pursuant to the Findings, Decision and Judgment Entry filed on February 7, 1990. [T]he Court makes the following findings of fact and conclusions of law.

1. The Court finds in favor of Plaintiffs as to all issues except as set forth herein.

2. The complaint filed by Linda Putinski in the United States District Court for the Northern District of Ohio, Eastern Division, Case No. C87-3011A, against Plaintiffs alleges occurrences within time periods when Plaintiffs were named insureds under the two general liability insurance policies issued by Defendant.

3. The administrative orders, USEPA Docket No. V-W-87-C-031, and Remedial Investigation and Feasibility Study and notice letters issued by the USEPA and the complaint filed by the United States of America in the United States District Court for the Northern District of Ohio, Eastern Division, Case No. 5:89CV1988 ("USEPA claims") against Plaintiffs allege occurrences within the time periods when Plaintiffs were named insureds under the two general liability insurance policies issued by Defendant.

4. The third-party complaint including attachments filed by Aerosol Systems, Inc. and others against Plaintiff Hybud in the case styled *State of Ohio vs. William L. Campbell, et al. vs. County of Medina, et al.*, Case No. 42595 (Medina County Common Pleas Court) ("Montville Landfill lawsuit"), alleges occurrences within the time periods when Plaintiffs were named insureds under the two general liability insurance policies issued by Defendant.

5. Under said policies Defendant had a duty to provide a defense to Plaintiffs to the Linda Putinski complaint, the USEPA claims, and the Montville Landfill lawsuit.

6. Defendant failed to provide a defense to Plaintiffs to the Linda Putinski complaint, the USEPA claims, and the Montville Landfill lawsuit, and have failed to pay any of the defense costs incurred to date with respect to those matters.

7. Plaintiffs incurred total defense costs of $13,568.80 in the defense of the Linda Putinski complaint, of which $4,613.39 was paid by an insurance company other than Defendant.

8. Plaintiffs incurred total defense costs of $159,487.71 through March 31, 1990, in the defense of the USEPA claims, of which $47,728.77 was paid by four insurance companies other than Defendant.

9. Plaintiffs incurred total defense costs of $14,569.07 through March 31, 1990, in the defense of the Montville Landfill lawsuit, of which $8,554.35 was paid by two insurance companies other than Defendant.

10. Plaintiffs incurred total prosecution costs of $36,926.10 through March 31, 1990, in the prosecution of the above captioned case. None of said costs have been paid by any insurance companies.

11. All of the defense costs and prosecution costs through March 31, 1990 were reasonable and necessary.

12. Plaintiffs are entitled to prejudgment interest in the total amount of $17,631.83.

13. Defendant is liable to Plaintiffs in the total amount of $181,287.00 on account of defense costs incurred by Plaintiffs in defending the Linda Putinski complaint, the USEPA claims, and the Montville Landfill lawsuit and prosecution costs of the above-captioned case, through March 31, 1990.

14. Defendant is ordered to assume the defense of the complaints against Plaintiffs which remain pending filed by the United States and the third party plaintiffs in the Montville Landfill lawsuit and further described above.

15. Defendant is ordered to pay the prosecution costs in this case incurred or to be incurred after March 31, 1990.

16. Plaintiffs are not entitled to any other damages except as set forth above.

/s/ GLEN B. MORGAN
Judge

APPROVED:

/s/ MATTHEW YACKSHAW
Matthew Yackshaw
Attorney for Plaintiffs

DAVID ROSS
Attorney for Defendant

ORDER OF THE SUPREME COURT OF OHIO DENYING PETITION FOR REHEARING

(Dated October 28, 1992)

Case No. 91-641

THE SUPREME COURT OF OHIO

HYBUD EQUIPMENT CORPORATION, *et al.*,
Appellants/Cross-Appellees,

v.

SPHERE DRAKE INSURANCE COMPANY, LTD.,
Appellee/Cross-Appellant.

REHEARING ENTRY

(Summit County)

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals No. 14597)

/s/ THOMAS J. MOYER
Chief Justice

CONSTITUTION OF UNITED STATES

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

(Effective 1791)

Amendment XIV

SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 UNITED STATES CODE

§9605. National contingency plan; preparation, contents, etc.

(a) **Revision and republication.** Within one hundred and eighty days after the enactment of this Act [enacted Dec. 11, 1980], the President shall, after notice and opportunity for public comments, revise and republish the national contingency plan for the removal of oil and hazardous substances, originally prepared and published pursuant to section 311 of the Federal Water Pollution Control Act [33 USCS §1321], to reflect and effectuate the responsibilities and powers created by this Act, in addition to those matters specified in section 311(c)(2) [33 USCS §1321(c)(2)]. Such revision shall include a section of the plan to be known as the national hazardous substance response plan which shall establish procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants, which shall include at a minimum:

(1) methods for discovering and investigating facilities at which hazardous substances have been disposed of or otherwise come to be located;
(2) methods for evaluating, including analyses of relative cost, and remedying any releases or threats of releases from facilities which pose substantial danger to the public health or the environment;
(3) methods and criteria for determining the appropriate extent of removal, remedy, and other measures authorized by this Act;
(4) appropriate roles and responsibilities for the Federal, State, and local governments and for interstate and nongovernmental entities in effectuating the plan;

(5) provision for identification, procurement, maintenance, and storage of response equipment and supplies;

(6) a method for and assignment of responsibility for reporting the existence of such facilities which may be located on federally owned or controlled properties and any releases of hazardous substances from such facilities;

(7) means of assuring that remedial action measures are cost-effective over the period of potential exposure to the hazardous substances or contaminated materials;

(8)(A) criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable taking into account the potential urgency of such action, for the purpose of taking removal action. Criteria and priorities under this paragraph shall be based upon relative risk or danger to public health or welfare or the environment, in the judgment of the President, taking into account to the extent possible the population at risk, the hazard potential of the hazardous substances at such facilities, the potential for contamination of drinking water supplies, the potential for direct human contact, the potential for destruction of sensitive ecosystems, the damage to natural resources which may affect the human food chain and which is associated with any release or threatened release, the contamination or potential contamination of the ambient air which is associated with the release or threatened release, State preparedness to assume State costs and responsibilities, and other appropriate factors;

(B) based upon the criteria set forth in subparagraph (A) of this paragraph, the President shall list as part of the plan national priorities among the known releases or threatened releases throughout the United States and shall revise the list no less often than annually. Within one year after the date of enactment of this Act [enacted Dec. 11, 1980], and annually thereafter, each State shall establish and submit for consideration by the President priorities for remedial action among known releases and potential releases in that State based upon the criteria set forth in subparagraph (A) of this paragraph. In assembling or revising the national list, the President shall consider any priorities established by the States. To the extent practicable, the highest priority facilities shall be designated individually and shall be referred to as the "top priority among known response targets", and, to the extent practicable, shall include among the one hundred highest priority facilities one such facility from each State which shall be the facility designated by the State as presenting the greatest danger to public health or welfare or the environment among the known facilities in such State. A State shall be allowed to designate its highest priority facility only once. Other priority facilities or incidents may be listed singly or grouped for response priority purposes;

(9) specified roles for private organizations and entities in preparation for response and in responding to releases of hazardous substances, including identification of appropriate qualifications and capacity therefor and including consideration of minority firms in accordance with subsection (f); and

(10) standards and testing procedures by which alternative or innovative treatment technologies can be determined to be appropriate for utilization in response actions authorized by this Act.

The plan shall specify procedures, techniques, materials, equipment, and methods to be employed in identifying, removing, or remedying releases of hazardous substances comparable to those required under section 311(c)(2)(F) and (G) and (j)(1) of the Federal Water Pollution Control Act [33 USCS §1321(c)(2)(F), (G) and (j)(1)]. Following publication of the revised national contingency plan, the response to and actions to minimize damage from hazardous substances releases shall, to the greatest extent possible, be in accordance with the provisions of the plan. The President may, from time to time, revise and republish the national contingency plan.

(b) Revision of plan. Not later than 18 months after the enactment of the Superfund Amendments and Reauthorization Act of 1986 [enacted Oct. 17, 1986], the President shall revise the National Contingency Plan to reflect the requirements of such amendments. The portion of such Plan known as "the National Hazardous Substance Response Plan" shall be revised to provide procedures and standards for remedial actions undertaken pursuant to this Act which are consistent with amendments made by the Superfund Amendments and Reauthorization Act of 1986 relating to the selection of remedial action.

(c) Hazard ranking system. (1) Revision. Not later than 18 months after the enactment of the Superfund Amendments and Reauthorization Act of 1986 [enacted Oct. 17, 1986] and after publication of notice and opportunity for submission of comments in accordance with section 553 of title 5, United States Code, the President shall by rule promulgate amendments to the hazard ranking system in effect on September 1, 1984. Such amendments shall assure, to the maximum extent feasible, that the hazard ranking system accurately assesses the relative degree of risk to human health and the environment posed by sites and facilities subject to review. The President shall establish an effective date for the amended hazard ranking system which is not later than 24 months after enactment of the Superfund Amendments and Reauthorization Act of 1986 [enacted Oct. 17, 1986]. Such amended hazard ranking system shall be applied to any site or facility to be newly listed on the National Priorities List after the effective date established by the President. Until such effective date of the regulations, the hazard ranking system in effect on September 1, 1984, shall continue in full force and effect.

(2) Health assessment of water contamination risks. In carrying out this subsection, the President shall ensure that the human health risks associated with the contamination or potential contamination (either directly or as a result of the runoff of any hazardous substance or pollutant or contaminant from sites or facilities) of surface water are appropriately assessed where such surface water is, or can be, used for recreation or potable water consumption. In making the assessment required pursuant to the preceding sentence, the President shall take into account the potential migration of any hazardous substance or pollutant or contaminant through such surface water to downstream sources of drinking water.

(3) Reevaluation not required. The President shall not be required to reevaluate, after the date of the enactment of the Superfund Amendments and Reauthorization Act of 1986 [enacted Oct. 17, 1986] the hazard ranking of any facility which was evaluated in accordance with the criteria under this section before the effective date of the amendments to the hazard ranking system under this subsection and which was assigned a national priority under the National Contingency Plan.

(4) New information. Nothing in paragraph (3) shall preclude the President from taking new information into account in undertaking response actions under this Act.

(d) Petition for assessment of release. Any person who is, or may be, affected by a release or threatened release of a hazardous substance or pollutant or contaminant, may petition the President to conduct a preliminary assessment of the hazards to public health and the environment which are associated with such release or threatened release. If the President has not previously conducted a preliminary assessment of such release, the President shall, within 12 months after the receipt of any such petition, complete such assessment or provide an explanation of why the assessment is not appropriate. If the preliminary assessment indicates that the release or threatened release concerned may pose a threat to human health or the environment, the President shall promptly evaluate such release or threatened release in accordance with the hazard ranking system referred to in paragraph (8)(A) of subsection (a) to determine the national priority of such release or threatened release.

(e) **Releases from earlier sites.** Whenever there has been, after January 1, 1985, a significant release of hazardous substances or pollutants or contaminants from a site which is listed by the President as a "Site Cleaned Up To Date" on the National Priorities List (revised edition, December 1984) the site shall be restored to the National Priorities List, without application of the hazard ranking system.

(f) **Minority contractors.** In awarding contracts under this Act, the President shall consider the availability of qualified minority firms. The President shall describe, as part of any annual report submitted to the Congress under this Act, the participation of minority firms in contracts carried out under this Act. Such report shall contain a brief description of the contracts which have been awarded to minority firms under this Act and of the efforts made by the President to encourage the participation of such firms in programs carried out under this Act.

(g) Special study wastes. (1) Application. This subsection applies to facilities—

> (A) which as of the date of enactment of the Superfund Amendments and Reauthorization Act of 1986 [enacted Oct. 17, 1986] were not included on, or proposed for inclusion on, the National Priorities List; and
>
> (B) at which special study wastes described in paragraph (2), (3)(A)(ii) or (3)(A)(iii) of section 3001(b) of the Solid Waste Disposal Act [42 USCS §6921(b)(2), (3)(A)(ii), or (3)(A)(iii)] are present in significant quantities, including any such facility from which there has been a release of a special study waste.

(2) Considerations in adding facilities to NPL. Pending revision of the hazard ranking system under subsection (c), the President shall consider each of the following factors in adding facilities covered by this section to the National Priorities List:

> (A) The extent to which hazard ranking system score for the facility is affected by the presence of any special study waste at, or any release from, such facility.
>
> (B) Available information as to the quantity, toxicity, and concentration of hazardous substances that are constituents of any special study waste at, or released from such facility, the extent of or potential for release of such hazardous constituents, the exposure or potential exposure to human population and the environment, and the degree of hazard to human health or the environment posed by the release of such hazardous constituents at such facility. This subparagraph refers only to available information on actual concentrations of hazardous substances and not on the total quantity of special study waste at such facility.

(3) Savings provisions. Nothing in this subsection shall be construed to limit the authority of the President to remove any facility which as of the date of enactment of the Superfund Amendments and Reauthorization Act of 1986 [enacted Oct. 17, 1986] is included on the National Priorities List from such List, or not to list any facility which as of such date is proposed for inclusion on such list.

(4) Information gathering and analysis. Nothing in this Act shall be construed to preclude the expenditure of monies from the Fund for gathering and analysis of information which will enable the President to consider the specific factors required by paragraph (2).

* * *

§9606. Abatement actions

(a) Maintenance, jurisdiction, etc. In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

(b) **Fines; reimbursement.** (1) Any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues.

(2)(A) Any person who receives and complies with the terms of any order issued under subsection (a) may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest. Any interest payable under this paragraph shall accrue on the amounts expended from the date of expenditure at the same rate as specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1954 [26 USCS §§9501 et seq.].

(B) If the President refuses to grant all or part of a petition made under this paragraph, the petitioner may within 30 days of receipt of such refusal file an action against the President in the appropriate United States district court seeking reimbursement from the Fund.

(C) Except as provided in subparagraph (D), to obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 107(a) [42 USCS §9607(a)] and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

(D) A petitioner who is liable for response costs under section 107(a) [42 USCS §9607(a)] may also recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law. Reimbursement awarded under this subparagraph shall include all reasonable response costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law.

(E) Reimbursement awarded by a court under subparagraph (C) or (D) may include appropriate costs, fees, and other expenses in accordance with subsections (a) and (d) of section 2412 of title 28 of the United States Code.

(c) **Guidelines for using imminent hazard, enforcement, and emergency response authorities; promulgation by Administrator of EPA, scope, etc.** Within one hundred and eighty days after enactment of this Act [enacted Dec. 11, 1980], the Administrator of the Environmental Protection Agency shall, after consultation with the Attorney General, establish and publish guidelines for using the imminent hazard, enforcement, and emergency response authorities of this section and other existing statutes administered by the Administrator of the Environmental Protection Agency to effectuate the responsibilities and powers created by this Act. Such guidelines shall to the extent practicable be consistent with the national hazardous substance response plan, and shall include, at a minimum, the assignment of responsibility for coordinating response actions with the issuance of administrative orders, enforcement of standards and permits, the gathering of information, and other imminent hazard and emergency powers authorized by (1) sections 311(c)(2), 308, 309, and 504(a) of the Federal Water Pollution Control Act [33 USCS §§1321(c)(2), 1318, 1319, 1364(a)], (2) sections 3007, 3008, 3013, and 7003 of the Solid Waste Disposal Act [42 USCS §§6927, 6928, 6934, and 6973], (3) sections 1445 and 1431 of the Safe Drinking Water Act [42 USCS

§§300j-4 and 300i], (4) sections 113, 114, and 303 of the Clean Air Act [42 USCS §§7413, 7414, and 7603], and (5) section 7 of the Toxic Substances Control Act [15 USCS §2606].

* * *

§9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date. Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
> (D) the costs of any health assessment or health effects study carried out under section 104(i) [42 USCS §9604(i)].

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1954 [26 USCS §§9501 et seq.]. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity"shall be determined with reference to the date on which interest accruing under this subsection commences.

* * *

CONSTITUTION OF OHIO

Article I, Section 5

§5 Trial by jury; reform in civil jury system.

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury. (As amended September 3, 1912.)

OHIO REVISED CODE

3901.20 Unfair or deceptive acts prohibited; applicability to unlicensed persons

No person shall engage in this state in any trade practice which is defined in sections 3901.19 to 3901.23 of the Revised Code as, or determined pursuant to those sections to be, an unfair or deceptive act or practice in the business of insurance.

This section applies to any person, as defined in section 3901.19 of the Revised Code, regardless of whether the person is licensed or required to be licensed by the superintendent of insurance.

3901.21 Unfair and deceptive acts defined

The following are hereby defined as unfair and deceptive acts or practices in the business of insurance:

(A) Making, issuing, circulating, or causing or permitting to be made, issued, or circulated, or preparing with intent to so use, any estimate, illustration, circular, or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends or share of the surplus to be received thereon, or making any false or misleading statements as to the dividends or share of surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer as shown by the last preceding verified statement made by it to the insurance department of this state, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation or incomplete comparisons to any person for the purpose of inducing or tending to induce such person to purchase, amend, lapse, forfeit, change, or surrender insurance.

Any written statement concerning the premiums for a policy which refers to the net cost after credit for an assumed dividend, without an accurate written statement of the gross premiums, cash values, and dividends based on the insurer's current dividend scale, which are used to compute the net cost for such policy and a prominent warning that the rate of dividend is not guaranteed, is a misrepresentation for the purposes of this division.

(B) Making, publishing, disseminating, circulating, or placing before the public or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine, or other publication, or in the form of a notice, circular, pamphlet, letter, or poster, or over any radio station, or in any other way, or preparing with intent to so use, an advertisement, announcement, or statement containing any assertion, representation, or statement, with respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive, or misleading.

(C) Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting, or encouraging the making, publishing, disseminating, or circulating, or preparing with intent to so use, any statement, pamphlet, circular, article, or literature, which is false as to the financial condition of an insurer and which is calculated to injure any person engaged in the business of insurance.

(D) Filing with any supervisory or other public official, or making, publishing, circulating, or delivering to any person, or placing before the public, or causing directly or indirectly to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false statement of financial condition of an insurer.

Making any false entry in any book, report, or statement of any insurer with intent to deceive any agent or examiner lawfully appointed to examine into its condition or into any of its affairs, or any public official to whom such insurer is required by law to report, or who has authority by law to examine into its condition or into any of its affairs, or, with like intent, willfully omitting to make a true entry of any material fact pertaining to the business of such insurer in any book, report, or statement of such insurer, or mutilating, destroying, suppressing, withholding, or concealing any of its records.

(E) Issuing or delivering or permitting agents, officers, or employees to issue or deliver agency company stock or other capital stock or benefit certificates or shares in any common-law corporation or securities or any special or advisory board contracts or other contracts of any kind promising returns and profits as an inducement to insurance.

(F) Making or permitting any unfair discrimination among individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract.

(G)(1) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of life insurance, life annuity or accident and health insurance, or agreement as to such contract other than as plainly expressed in the contract issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance, or annuity, any rebate of premiums payable on the contract or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract; or giving, or selling, or purchasing, or offering to give, sell, or purchase, as inducement to such insurance or annuity or in connection therewith, any stocks, bonds, or other securities, or other obligations of any insurance company or other corporation, association, or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the contract.

(2) Nothing in division (F) or division (G)(1) of this section shall be construed as prohibiting any of the following practices: (a) in the case of any contract of life insurance or life annuity, paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance, provided that any such bonuses or abatement of premiums shall be fair and equitable to policyholders and for the best interests of the company and its policyholders; (b) in the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an

amount which fairly represents the saving in collection expenses; (c) readjustment of the rate of premium for a group insurance policy based on the loss or expense experience thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year.

(H) Making, issuing, circulating, or causing or permitting to be made, issued, or circulated, or preparing with intent to so use, any statement to the effect that a policy of life insurance is, is the equivalent of, or represents shares of capital stock or any rights or options to subscribe for or otherwise acquire any such shares in the life insurance company issuing that policy or any other company.

(I) Making, issuing, circulating, or causing or permitting to be made, issued or circulated, or preparing with intent to so issue, any statement to the effect that payments to a policyholder of the principal amounts of a pure endowment are other than payments of a specific benefit for which specific premiums have been paid.

(J) Making, issuing, circulating or causing or permitting to be made, issued, or circulated, or preparing with intent to so use, any statement to the effect that any insurance company was required to change a policy form or related material to comply with Title XXXIX of the Revised Code or any regulation of the superintendent of insurance, for the purpose of inducing or intending to induce any policyholder or prospective policyholder to purchase, amend, lapse, forfeit, change, or surrender insurance.

(K) Aiding or abetting another to violate this section.

(L) Refusing to issue any policy of insurance, or canceling or declining to renew such policy because of the sex or marital status of the applicant, prospective insured, insured, or policyholder.

(M) Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of insurance, other than life insurance, or in the benefits payable thereunder, or in underwriting standards and practices or eligibility requirements, or in any of the terms or conditions of such contract, or in any other manner whatever.

(N) Refusing to make available disability income insurance solely because the applicant's principal occupation is that of managing a household.

(O) Refusing, when offering maternity benefits under any individual or group sickness and accident insurance policy, to make maternity benefits available to the policyholder for the individual or individuals to be covered under any comparable policy to be issued for delivery in this state, including family members if the policy otherwise provides coverage for family members. Nothing in this division shall be construed to prohibit an insurer from imposing a reasonable waiting period for such benefits, but in no event shall such waiting period exceed two hundred seventy days.

(P) Using, or permitting to be used, a pattern settlement as the basis of any offer of settlement. As used in this division, "pattern settlement" means a method by which liability is routinely imputed to a claimant without an investigation of the particular occurrence upon which the claim is based and by using a predetermined formula for the assignment of liability arising out of occurrences of a similar nature. Nothing in this division shall be construed to prohibit an insurer from determining a claimant's liability by applying formulas or guidelines to the facts and circumstances disclosed by the insurer's investigation of the particular occurrence upon which a claim is based.

(Q) Refusing to insure, or refusing to continue to insure, or limiting the amount, extent, or kind of life or sickness and accident insurance or annuity coverage available to an individual, or charging an individual a different rate for the same coverage solely because of blindness or partial blindness. With respect to all other conditions, including the underlying cause of blindness or partial blindness, persons who are blind or partially blind shall be subject to the same standards of sound actuarial principles or actual or reasonably anticipated actuarial experience as are sighted persons. Refusal to insure includes, but is not limited to, denial by an insurer of disability insurance coverage on the grounds that the policy defines "disability" as being presumed in the event that the eyesight of the insured is lost. However, an insurer may exclude from coverage disabilities consisting solely of blindness or partial blindness when such conditions existed at the time the policy was issued. To the extent that the provisions of this division may appear to conflict with any provision of section 3999.16 of the Revised Code, this division applies.

(R)(1) Directly or indirectly offering to sell, selling, or delivering, issuing for delivery, renewing, or using or otherwise marketing any policy of insurance or insurance product in connection with or in any way related to the grant of a student loan guaranteed in whole or in part by an agency or commission of this state or the United

States, except insurance that is required under federal or state law as a condition for obtaining such a loan and the premium for which is included in the fees and charges applicable to the loan; or, in the case of an insurer or insurance agent, knowingly permitting any lender making such loans to engage in such acts or practices in connection with the insurer's or agent's insurance business.

(2) Except in the case of a violation of division (G) of this section, division (R)(1) of this section does not apply to either of the following:

(a) Acts or practices of an insurer, its agents, representatives, or employees in connection with the grant of a guaranteed student loan to its insured or the insured's spouse or dependent children where such acts or practices take place more than ninety days after the effective date of the insurance;

(b) Acts or practices of an insurer, its agents, representatives, or employees in connection with the solicitation, processing, or issuance of an insurance policy or product covering the student loan borrower or his spouse or dependent children, where such acts or practices take place more than one hundred eighty days after the date on which the borrower is notified that the student loan was approved.

(S) Denying coverage, under any health insurance or health care policy, contract, or plan providing family coverage, to any natural or adopted child of the named insured or subscriber solely on the basis that the child does not reside in the household of the named insured or subscriber.

With respect to private passenger automobile insurance, no insurer shall charge different premium rates to persons residing within the limits of any municipal corporation based solely on the location of the residence of the insured within those limits.

The enumeration in sections 3901.19 to 3901.26 of the Revised Code of specific unfair or deceptive acts or practices in the business of insurance is not exclusive or restrictive or intended to limit the powers of the superintendent of insurance to adopt rules to implement this section, or to take action under other sections of the Revised Code.

This section does not prohibit the sale of shares of any investment company registered under the "Investment Company Act of 1940," 54 Stat. 789, 15 U.S.C.A. 80a-1, as amended, or any policies, annuities, or other contracts described in section 3907.15 of the Revised Code.

As used in this section, "estimate," "statement," "representation," "misrepresentation," "advertisement," or "announcement" includes oral or written occurrences.

3937.03 Filing policies, endorsements, riders, and rates; waiting period for filings affecting commercial insurance market; special filings

(A) Every insurer shall file with the superintendent of insurance every form of a policy, endorsement, rider, manual of classifications, rules, and rates, every rating plan, and every modification of any of them which it proposes to use. Every such filing shall state any proposed effective date and indicate the character and extent of the coverage contemplated. When a filing is not accompanied by the information upon which the insurer supports such filing, and the superintendent does not have sufficient information to determine whether such filing complies with sections 3937.01 to 3937.17 of the Revised Code, he may require such insurer to furnish the information upon which it supports such filing. Any filing may be supported by the experience or judgment of the insurer or rating organization making the filing, the experience of other insurers or rating organizations, or any other factors which the insurer or rating organization considers relevant. A filing and any supporting information shall be open to public inspection after the filing becomes effective.

(B) An insurer may satisfy its obligation to make such filings by becoming a member of, or a subscriber to, a licensed rating organization which makes such filings, and by authorizing the superintendent to accept such filings on its behalf. Sections 3937.01 to 3937.17 of the Revised Code do not require an insurer to become a member of or a subscriber to any rating organization.

(C)(1) For purposes of this division:

(a) "Commercial insurance" means any commercial casualty or commercial liability insurance except sickness and accident, fidelity and surety, and automobile insurance as defined in section 3937.30 of the Revised Code.

(b) "Personal lines coverage" means any policy of insurance issued to a natural person for personal or family protection, including, but not limited to, personal automobile, homeowner's, tenant's, and personal umbrella liability coverages.

(2) Except as provided in division (C)(3) of this section, each filing shall become effective immediately upon its filing and is deemed to comply with such sections, unless disapproved by the superintendent as provided in this section or section 3937.04 of the Revised Code.

(3) Whenever the superintendent declares by rule pursuant to Chapter 119 of the Revised Code that a degree of competition that will assure that rates are not excessive does not exist in the market for a line of commercial insurance, or that the market is conducted in a manner that may result in inadequate rates or be destructive of competition or detrimental to solvency of insurers, he shall provide that every filing that would result in an increase or decrease of rates for any coverages for that line of commercial insurance shall be subject to this division. Such filing shall be on file for a waiting period of thirty days before it becomes effective, which period may be extended by the superintendent for one additional period not to exceed fifteen days, if he gives written notice within such initial waiting period to the insurer or rating bureau that he needs such additional time for the consideration of such filing. A filing is deemed to comply with sections 3937.04 to 3937.17 of the Revised Code unless disapproved by the superintendent within the waiting period or its extension. Upon written application by such insurer or rating bureau, the superintendent may authorize a filing that he has reviewed to become effective before the expiration of the initial waiting period or its extension. If, during the initial waiting period or extension, the superintendent finds the filing to which sections 3937.04 to 3937.17 of the Revised Code apply does not comply with the sections, he shall disapprove the filing by

sending written notice to the person who made the filing, specifying therein the reasons the filing fails to comply with the sections. Upon notice of disapproval, the person who made such a filing may request a hearing pursuant to section 3937.15 of the Revised Code.

(4) In determining whether circumstances exist in a market for a line of commercial insurance as required in division (C)(3) of this section, the superintendent shall consider all relevant structural factors in determining the conditions of the market, including: the number of insurers actively engaged in providing coverage; market shares; changes in market shares; and ease of entry.

(5) This division does not apply to any filings required under Chapter 3937. of the Revised Code for personal lines coverage.

(6) Any rule adopted by the superintendent under this division shall expire one year after its issuance unless rescinded earlier or extended by rule adopted by the superintendent.

(D) A special filing may be made with respect to a surety or guaranty bond required by law, by court or executive order, or by order, rule, or regulation of a public body not covered by a previous filing.

(E) Special filings may be made at any time with respect to any individual or special risks whose size, classification, degree of exposure to loss, previous loss experience, or other relevant factors call for the exercise of sound underwriting judgment in the promulgation of rates appropriate in such individual or special risks. The superintendent may make such examination as he considers advisable to ascertain whether such rates meet the standards set forth in division (D) of section 3937.02 of the Revised Code.

(F) The superintendent may, by written order, suspend or modify the requirement of filing as to any kind of insurance, subdivision, or combination thereof, or as to classes of risks, the rates for which cannot practicably be filed before they are used. Such orders shall be made known to insurers and rating organizations affected thereby. The superintendent may make such examination as he considers advisable to ascertain whether any rates affected by such order meet the standards set forth in division (D) of section 3937.02 of the Revised Code.

(G) Upon the written application of the insured, stating his reasons therefor, filed with and approved by the superintendent, a rate in excess of that provided by a filing otherwise applicable may be used on any specific risk.

(H) No insurer shall make or issue a contract or policy except in accordance with filings which are in effect for said insurer as provided in sections 3937.01 to 3937.17 of the Revised Code.

OHIO CIVIL RULES 38 AND 39

RULE 38. Jury trial of right

Right preserved. The right to trial by jury shall be preserved to the parties inviolate.

(B) Demand. Any party may demand a trial by jury on any issue triable of right by a jury by serving upon the other parties a demand therefor at any time after the commencement of the action and not later than fourteen days after the service of the last pleading directed to such issue. Such demand shall be in writing and may be indorsed upon a pleading of the party. If the demand is endorsed upon a pleading the caption of the pleading shall state "jury demand endorsed hereon." In an action for appropriation of a right of way brought by a corporation pursuant to Article XIII, Section 5, of the Ohio Constitution, the jury shall be composed of twelve members unless the demand specifies a lesser number; and in the event of timely demand by more than one party in such action the jury shall be composed of the greater number not to exceed twelve. In all other civil actions the jury shall be composed of eight members unless the demand specifies a lesser number; and in the event of timely demand by more than one party in such actions the jury shall be composed of the greater number not to exceed eight.

(C) Specification of issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within fourteen days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(D) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(D) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

(Amended, eff. 7-1-72; 7-1-76)

RULE 39. Trial by jury or by the court

(A) By jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own intiative finds that a right of trial by jury of some or all of those issues does not exist. The failure of a party or his attorney of record either to answer or appear for trial constitutes a waiver of trial by jury by such party and authorizes submission of all issues to this court.

(B) By the court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(C) Advisory jury and trial by consent. In all actions not triable of right by a jury (1) the court upon motion or on its own initiative may try any issue with an advisory jury or (2) the court, with the consent of both parties, may order a trial of any issue with a jury, whose verdict has the same effect as if trial by jury had been a matter of right.

(Amended, eff. 7-1-71).

CASES POLICYHOLDERS CLAIM REJECT THE INSURANCE INDUSTRY'S CONSTRUCTION OF THE POLLUTION EXCLUSION

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